Supreme Court, U.S.
FILED
D11541 APR 10 2002
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No. 01-

IN THE

Supreme Court of the United States

SAGE REALTY CORPORATION, THE WILLIAM KAUFMAN ORGANIZATION, LTD., 4 THIRD AVENUE FEE LLC, WATER STREET FEE LLC, 7 THIRD AVENUE FEE LLC, MADISON AVENUE FEE LLC, MADISON AVENUE LEASEHOLD LLC, 7 THIRD AVENUE LEASEHOLD LLC, 4 THIRD AVENUE LEASEHOLD LLC, WATER STREET LEASEHOLD LLC, MELVYN KAUFMAN and ROBERT KAUFMAN,

Petitioners,

v.

PROSKAUER ROSE LLP and NOMURA SECURITIES INTERNATIONAL, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE FIRST DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment of the United States Constitution requires that, on a motion to dismiss for alleged spoliation of evidence where the facts are in dispute and the credibility of witnesses is an issue, an evidentiary hearing be conducted before dismissing viable claims of $50 million?

RULE 29.6 STATEMENT

None of the petitioners has a parent company and no publicly held company owns ten percent, or more, of the stock of any petitioner. The St. Paul Companies, Inc., a publicly traded company, has an indirect interest in some of the petitioners.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the decision and order of the Appellate Division of the Supreme Court of the State of New York for the First Department, dated September 7, 2000.

OPINIONS BELOW

The decision and order of the Appellate Division of the Supreme Court of the State of New York for the First Department (the "First Department"), dated September 7, 2000, affirming dismissal of virtually all of petitioners' claims due to alleged spoliation, is reported at *Sage Realty Corp. v. Proskauer Rose LLP*, 275 A.D.2d 11 (1st Dep't 2000). (*See* Appendix ("App.") at 1a-11a.) That order affirmed the February 17, 2000 decision and order of the Supreme Court of the State of New York for New York County, which is reported at N.Y. L.J., Feb. 18, 2000, at 29 (Sup. Ct. N.Y. County Feb. 17, 2000). (App. at 12a-20a.)

The decision and order of the First Department, dated June 21, 2001, upholding dismissal of petitioners' remaining claims due to the same alleged spoliation, is reported at *Sage Realty Corp. v. Proskauer Rose LLP*, 284 A.D.2d 239 (1st Dep't 2001). (App. at 21a-22a.) That order affirmed the January 29, 2001 decision and order of the Supreme Court of the State of New York for New York County, which is not reported. (App. at 23a-26a.)

The order of the Court of Appeals of the State of New York dismissing petitioners' first motion for leave to appeal on the ground that the order then appealed was not final, dated September 6, 2001, is reported at *Sage Realty Corp. v. Proskauer Rose LLP*, 96 N.Y.2d 937 (2001). (App. at 27a-28a.) The order of the Court of Appeals of the State of New York denying petitioners' second motion for leave to appeal, dated January 10, 2002, is reported at *Sage Realty Corp. v. Proskauer Rose LLP*, No. 1319, 2002 N.Y. LEXIS 44 (N.Y. Jan. 10, 2002). (App. at 29a.)

STATEMENT OF JURISDICTION

The order of the Court of Appeals of the State of New York denying petitioners' second motion for leave to appeal was entered on January 10, 2002.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment of the United States Constitution provides, in relevant part, that:

> nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

A. Introduction

Spoliation is "the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (CA2 1999) (citing BLACK'S LAW DICTIONARY 1401 (6th ed. 1990)).

In resolving motions for alleged spoliation, courts consider a myriad of factual issues, including: (1) whether items were actually destroyed; (2) whether those items are relevant to the issues in the case; (3) whether the alleged spoliation prejudices the non-spoliating party in proving a

claim or defense; (4) whether the alleged destruction was done negligently, in bad faith or in some other manner; (5) whether the discarded items were material or key evidence; (6) whether the alleged spoliation was done prior to or after the contemplation of litigation; (7) whether the alleged spoliation violated a court order; (8) whether to apply the "adverse inference," or the "spoliation inference," a doctrine providing that "spoliation of evidence germane 'to proof of an issue at trial can support an inference that the evidence would have been unfavorable to the party responsible for its destruction'";[1] (9) whether to apply sanctions or other remedies; and (10) if dismissal is considered, whether any alternative less severe than dismissal should be imposed.

On a motion to dismiss due to alleged spoliation, like a summary judgment motion under Rule 56 of the Federal Rules of Civil Procedure (FED. R. CIV. P. 56 (hereinafter "FRCP")) or, as in this case, Section 3212 of New York's Civil Practice Law & Rules (N.Y. C.P.L.R. § 3212 (McKinney 1992 & Supp. 2002) (hereinafter "CPLR")), a court may: (i) decide the motion on papers alone when no disputed facts exist; or (ii) conclude that disputed facts require an evidentiary hearing before the trier of fact prior to deciding the motion; or (iii) submit the factual issues to the jury at trial. Unlike summary judgment, however, a motion to dismiss due to alleged spoliation is not subject to a federal or state counterpart to Rule 56 or CPLR 3212 requiring the court to refer any factual disputes to the trier of fact. Lacking statutes, rules, or coherent controlling case law, many courts have improperly determined issues of fact against an alleged

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1. *Byrnie v. Cromwell*, 243 F.3d 93, 107 (CA2 2001) (quoting *Kronisch v. United States*, 150 F.3d 112, 126 (CA2 1998)); *see also* RICHARD T. FARRELL, PRINCE, RICHARDSON ON EVIDENCE § 3-141 (11th ed. 1995 & Supp. 2000); 2 JOHN W. STRONG, MCCORMICK ON EVIDENCE § 264 (5th ed. 1999).

spoliator without conducting evidentiary hearings, and/or failed to refer factual issues to the jury. Such actions are clear violations of an alleged spoliator's constitutionally protected right to due process.

There is a split of authority, and thus a clear conflict, among the circuit courts of appeals and the state courts of last resort as to whether and when a court must conduct an evidentiary hearing, rather than resolve disputed facts. *Compare Silvestri v. General Motors Corp.*, 271 F.3d 583, 590 (CA4 2001), *with Gratton v. Great Am. Communications*, 178 F.3d 1373, 1375 (CA11 1999); *compare Torres v. Matsushita Elec. Corp.*, 762 So. 2d 1014, 1017-18 (Fla. Dist. Ct. App. 2000), *with Graves v. Daley*, 526 N.E.2d 679, 680 (Ill. App. Ct. 1988). There is also a clear conflict among these courts regarding when to apply the adverse inference and whether the court or the jury should determine the facts relating to its application. *Compare Anderson v. Cryovac, Inc.*, 862 F.2d 910, 925 (CA1 1988), *on remand*, 127 F.R.D. 1 (D. Mass. 1989), *cert. denied*, 498 U.S. 891 (1990), *with Rummery v. Illinois Bell Tel. Co.*, 250 F.3d 553, 558-59 (CA7 2001). The case law is inconsistent and confusing, resulting in a patchwork of diverse decisions that fails to articulate any uniform standard prescribing what process is due to alleged spoliators who raise disputed facts.

This Court has never squarely addressed spoliation. (*See infra* at 11.) This case presents an excellent vehicle for this Court to provide guidance regarding due process requirements applicable to a motion to dismiss viable claims due to alleged spoliation. Review is plainly warranted because minimum standards of due process in the context of spoliation need to be, but have not yet been, defined. As a result of the recent allegations of spoliation against Arthur Andersen LLP and Enron Corporation, the scores of law suits that will assuredly be brought due to those allegations, as well as the number of other lawsuits involving similar

assertions, spoliation will confront federal and state courts across the country with increasing frequency.

B. Background

This case presents a clear and concise record that petitioners were denied due process on a motion to dismiss due to alleged spoliation.

This malpractice and breach of contract action arises out of a 1995 mortgage-backed securities and refinancing transaction involving four commercial office properties located in Manhattan. Petitioners Melvyn Kaufman, Robert Kaufman and the other petitioners (the "petitioners") retained respondent Proskauer Rose LLP ("Proskauer") as counsel and respondent Nomura Securities International, Inc. ("Nomura") as the financial advisor to handle the transaction.

Petitioners commenced their case on November 1, 1996, ultimately asserting that Proskauer: (i) failed to disclose that it was representing Nomura at the same time it was representing petitioners, thereby creating a conflict of interest; (ii) told petitioners that the land beneath the buildings, or the fee interest, was not mortgaged in the transaction documents, when in fact it was mortgaged; and (iii) negotiated refinancing terms in the mortgages which violated federal tax laws applicable to a mortgage defeasance transaction, conflicted with New York State mortgage-recording tax statutes, and otherwise did not work. Petitioners sued Nomura for failing to negotiate a deal according to the term sheet the parties signed and for failing to negotiate refinancing terms that worked.

Petitioners' claims against Proskauer and Nomura survived motions to dismiss and motions for summary judgment. At the time they were dismissed, these claims were viable and required a trial.

During discovery, petitioners produced tapes and transcripts of recordings of nineteen telephone conversations concerning the transaction. Proskauer claimed that petitioners had to have more tapes. Petitioner Melvyn Kaufman ("Mr. Kaufman") volunteered that, after he had turned over all transaction tapes to his counsel, he had discarded his remaining tapes, since they were wholly unrelated to the transaction. Respondents conducted discovery of what they deemed to be spoliation of evidence and later moved to dismiss the case due to Mr. Kaufman's discarding of these irrelevant tapes.

In support of its motion to dismiss, Proskauer submitted an affidavit of an attorney who stated that, while she was working on the transaction, she had discussed the transaction with Mr. Kaufman on the telephone and in person, but she had no knowledge of what telephone conversations were taped. Petitioners proffered Mr. Kaufman's affidavit and deposition testimony that, after litigation was contemplated, he did not discard any tapes of conversations relating to the transaction. Petitioners submitted deposition testimony of former employees that corroborated Mr. Kaufman's statements that he taped some, but not all, telephone conversations, and otherwise supported his taping practices. Nomura submitted no affidavit.

Petitioners asserted that where issues of fact had been raised as to whether spoliation occurred, testimony at a hearing or trial was required. (New York Court of Appeals Record ("N.Y.R.") at AR3787-89; AR3769-3789.) Proskauer agreed that a hearing should be held. (N.Y.R. at AR3793.)

C. The Orders Below

The supreme court refused to hold an evidentiary hearing, thereby denying petitioners their rights to due process. (N.Y.R. at AR3794-95; App. at 16a.)

On February 9, 2000, New York's supreme court dismissed petitioners' claim against Nomura, and dismissed virtually all claims against Proskauer. The supreme court did not dismiss those portions of petitioners' claims against Proskauer relating to the undisclosed conflict of interest. (App. at 19a-20a.) In its order, the supreme court held that respondents were not required to prove that the discarded tape recordings were relevant, or crucial to their defense. Instead, the court relied upon "the circumstances surrounding the destruction of those tapes" as proof that the tapes must have been relevant, even though Mr. Kaufman swore that the tapes were not relevant. (App. at 13a.)

New York's supreme court inferred: (i) that the discarded tapes contained recordings of relevant conversations relating to the transaction; and (ii) that those conversations were adverse to petitioners. (App. at 15a-17a.) This is an improper application of the spoliation inference. First, relevance must be established by independent evidence and cannot be inferred. Unless relevance is established by separate evidence, the adverse inference may not be drawn against petitioners. Second, the facts relating to the inference should have been submitted to the jury, not the court, so the jury could have determined whether the discarded tapes contained conversations that were adverse to petitioners.[2] The inference made by the court constituted fact-finding on the part of the judge, thereby denying petitioners their due process rights to have a full evidentiary hearing.[3]

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2. *See* KEVIN F. O'MALLEY, JAY E. GRENIG, & HON. WILLIAM C. LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 104.26 (5th ed. 2001 & Supp. 2002); 1 NEW YORK PATTERN JURY INSTRUCTIONS 3d 1:77, 1.77.1 (2001).

3. The New York supreme court also awarded respondents their attorneys' fees incurred on the spoliation motion. (New York Court of Appeals Appendix, at 8a-15a.) Hearings were held to determine the amount of those fees, and ultimately petitioners paid respondents approximately $1,036,000 in attorneys' fees, an unprecedented sum.

The supreme court made findings of fact and weighed credibility by rejecting, without reason, Mr. Kaufman's affidavit and his deposition testimony. Quoting a First Department decision in which the court denied a request for a hearing despite the existence of disputed facts, the New York supreme court explicitly held that petitioners "were not entitled to a fact-finding hearing to determine the nature of [the] documents they wrongfully discarded." (App. at 16a (quoting *Sonmez v. World on Columbus, Inc.*, 689 N.Y.S.2d 505, 506 (1st Dep't 1999)).) This denial of a fact-finding hearing was a violation of due process.

Petitioners appealed. New York's Appellate Division, First Department affirmed. (App. at 11a.) In its order, the First Department failed to set forth standards for granting dismissal due to spoliation or to state from whence it derived the power to determine disputed issues of fact. First, the court explicitly rejected Mr. Kaufman's uncontroverted affidavit and deposition testimony that the discarded tapes were not related to the transaction. (App. at 8a-9a.) The First Department "easily inferred," as did the supreme court, that the discarded tapes contained recordings of relevant conversations, even though there was no proof that any discarded tape contained a recording of a relevant conversation. (App. at 8a.) The Proskauer partners who would have been parties to those alleged conversations had submitted affidavits, but in those affidavits, they failed to describe any alleged conversation sufficiently to show that the claimed conversation would have been relevant to the case. (N.Y.R. at AR2619-22; AR21-23; AR3769-89.)

Second, the First Department "inferred" that the destruction was done in bad faith, "an inference also circumstantially supported by the nature of [Mr.] Kaufman's conduct and timing." (App. at 9a.) The First Department reached these conclusions without reference to a hearing record and solely by reviewing Proskauer affidavits, which

petitioners had refuted. (N.Y.R. at AR21-23; AR2619-22.) The First Department failed to address the issue of a hearing and resolved the disputed facts against petitioners. (App. at 8a-11a.) The First Department concluded that petitioners' actions prejudiced respondents, although respondents failed to show how they were prejudiced.

Petitioners' surviving conflict of interest claim was later dismissed by the supreme court on Proskauer's subsequent summary judgment motion. The supreme court based its ruling exclusively on the same alleged spoliation of tapes. (App. at 23a-26a.) The Appellate Division again affirmed. (App. at 21a-22a.)

The New York Court of Appeals, in its discretion, dismissed petitioners' first motion for leave to appeal from the order that was final only as to Nomura, and later denied petitioners' second motion for leave to appeal from the final order in the case.[4] (App. at 27a-29a.)

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4. In determining not to hear petitioners' appeal, the Chief Judge of the New York Court of Appeals recused herself and took no part in the court's decision, ostensibly because her husband, Stephen Kaye, is a litigation partner at Proskauer. Since the Chief Judge's appointment to the Court of Appeals in 1993, Proskauer has appeared before the Court of Appeals approximately twenty (20) times, and the Chief Judge has taken no part in those cases. Petitioners submit that they, and each of the litigants involved in the other cases, were unfairly disadvantaged by the recusal and did not receive an appropriate appellate consideration, which constitutes a separate due process violation. Recusal of the Chief Judge, who is presumably among the most influential members of the Court of Appeals, on a regular basis, in all cases involving Proskauer, distorts the entire appellate process and deprives litigants of the participation of the Chief Judge to which they are entitled as a matter of fundamental fairness. A similar deficiency has been considered by this Court in formulating its own recusal policy. *See* The Supreme Court of the United States' Statement of Recusal Policy (Nov. 1, 1993); *see also*

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REASONS FOR GRANTING THE WRIT

This case presents a significant and recurring question concerning what constitutes due process where a purported spoliator raises disputed issues of fact on a motion to dismiss due to alleged spoliation.

While this Court has never conclusively addressed the issue of spoliation, this due process question has divided and confused both federal and state courts and is ripe for this Court's review. There are no statutes or rules that apply exclusively to motions to dismiss due to alleged spoliation. There is no controlling case law clearly articulating uniform standards to guide lower courts regarding the need to conduct an evidentiary hearing when faced with disputed facts as to whether spoliation occurred. Nor is there settled authority advising whether and when disputed facts concerning alleged spoliation must be submitted to a jury, rather than determined by the court.

Consequently, case law on spoliation is inconsistent and cannot be reconciled, producing a hodgepodge of opinions by federal and state courts. The result of this jumble of decisions is, at its best, spotty compliance with minimum due process standards and, at its worst, a total failure to safeguard these constitutional rights. *Compare Silvestri v. General Motors Corp.*, 271 F.3d 583, 595 (CA4 2001) (Traxler, J., dissenting in part, concurring in part) (where the court failed to conduct an evidentiary hearing on a spoliation motion), *with West v. Goodyear Tire & Rubber*

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Microsoft Corp. v. United States, 530 U.S. 1301 (2000); and *Laird v. Tatum*, 409 U.S. 824 (1972). This problem becomes even more acute where the recusal has taken place on the initial motion for leave to appeal, which occurred here, as opposed to a decision on the merits of the case after it has been accepted by the court for a hearing.

Co., 167 F.3d 776, 779 (CA2 1999) (where the court conducted an evidentiary hearing before determining a spoliation motion).

The emotionally-charged nature of allegations of spoliation often creates a visceral response. Many courts appear to respond to such allegations by exceeding the bounds of their discretion. Rather than parse the facts and determine, in a manner that comports with constitutional mandates, whether any spoliation occurred, they rush to punish the alleged spoliator.[5] Courts should be able to respond to allegations of spoliation. But they must follow clearly delineated guidelines that are consistent with due process. This Court should grant review in this case because the circuit courts of appeals and the state courts of last resort have shown that they are not up to the task of establishing uniform minimum standards.

I. Spoliation Is a Recurring Issue Which This Court Has Not Addressed for Over 100 Years

This Court has not addressed the issue of spoliation since the 19th century. *See The Olinde Rodrigues*, 174 U.S. 510, 538-39 (1899); *The Pizarro*, 15 U.S. (2 Wheat.) 227, 241-42 (1817).

Recently, there has been an explosion of lawsuits involving allegations of spoliation in the federal and state courts. David A. Bell et al., *Let's Level the Playing Field: A New Proposal For Analysis of Spoliation of Evidence Claims in Pending Litigation*, 29 ARIZ. ST. L.J. 769, 770 (Fall 1997). A Lexis search for case law concerning "spoliation" or the

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5. If the rulings in this case are left undisturbed, as one federal court noted, discarding irrelevant material will be a "strict liability discovery offense." *Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 167 F.R.D. 90, 115 (D. Colo. 1996).

"destruction of evidence" in *either* federal courts *or* state courts is automatically terminated because it identifies over 1,000 cases responsive to the inquiry. One recent survey has shown that "50% of all litigators found spoliation to be either a frequent or regular problem." Terry R. Spencer, *Do Not Fold Spindle or Mutilate: The Trend Towards Recognition of Spoliation As A Separate Tort*, 30 IDAHO L. REV. 37, 39 (1993) (citing C.R. Nesson, *Incentives to Spoliate Evidence In Civil Litigation: The Need for Vigorous Judicial Action*, 13 CARDOZO L. REV. 793, 793 (1991)). At the same time, practitioners have suggested that spoliation claims may be asserted "for the purpose of negotiating a favorable settlement" and may "be used increasingly as a litigation tactic." Laurie Kindel & Kai Richter, *Spoliation of Evidence: Will the New Millennium See a Further Expansion of Sanctions For the Improper Destruction of Evidence?*, 27 WM. MITCHELL L. REV. 687, 707 (2000).

Not only has spoliation been raised in the courtroom, it has also been the subject of extensive commentary in treatises, legal publications, and the press. *See* JAMIE S. GORELICK ET AL., DESTRUCTION OF EVIDENCE (1989 & Supp. 2002); Joseph B. Rizzo, *Judicial Departments Differ On Application of Spoliation Motion When Key Evidence Is Destroyed*, 73-FEB. N.Y. ST. B. J. 40 (Feb. 2001); John T. Donovan & Joseph J. Hamill, *Sabers Continue to Rattle In the Evidence Spoliation Battle*, PROD. LIABILITY L. & STRATEGY, at 5 (Sept. 1996); Elisabeth Bumiller, *Enron's Collapse: The Overview; Enron Contacted 2 Cabinet Officers Before Collapsing*, N.Y. TIMES, Jan. 11, 2002, at A1; David S. Hilzenrath, *Data Destruction Intensifies Andersen's Woes*, WASH. POST, Jan. 11, 2002, at E-01.

The proliferation of cases involving spoliation has caused rapid changes in the law. Bell, *Let's Level the Playing Field*,

29 ARIZ. ST. L.J. at 771 (quoting JOHN W. STRONG, MCCORMICK ON EVIDENCE § 265 (4th ed. 1992)). Commentators have proposed that the Federal Rules of Evidence be amended to address the confusion spawned by the various remedies for spoliation that are haphazardly applied by courts nationwide. Donald H. Flanary, Jr. & Bruce M. Flowers, *Spoliation of Evidence: Let's Have a Rule in Response*, 60 DEF. COUNS. J. 553 (1993); *see also* Brooks Morel, Note and Comment, *Now You See It, Now You Don't: A Georgia Perspective on Spoliation of Evidence*, 17 GA. ST. U. L. REV. 1163, 1183-85 (Summer 2001).

To date, eight states and the District of Columbia recognize an independent cause of action in tort for the intentional or negligent spoliation of evidence. GORELICK, DESTRUCTION OF EVIDENCE, Supp. § 4.4 (the eight states are: Alabama, Alaska, Florida, Illinois, Montana, New York, New Mexico, and Ohio); *see also Fada Indus., Inc. v. Falchi Bldg. Co.*, 189 Misc. 2d 1, 12 (Sup. Ct. Queens County 2001). New York also recognizes a common law remedy for spoliation of "key" or "crucial" evidence, which the courts apply pursuant to their inherent authority. *See DiDomenico v. C&S Aeromatik Supplies, Inc.*, 252 A.D.2d 41, 53 (2d Dep't 1998).

Commentators agree that currently the "state and federal courts lack a uniform approach for dealing with spoliation of evidence . . . ." Bell, *Let's Level the Playing Field*, 29 ARIZ. ST. L.J. at 775; J. Brian Slaughter, *Spoliation of Evidence: A New Rule of Evidence is the Better Solution*, 18 AM. J. TRIAL ADVOC. 449, 449 (Fall 1994) (stating that spoliation remedies cause "much confusion . . . where different remedies have been applied to similar situations, and where judges have been allowed to mix and match elements from these various remedies"). One author concluded that "[i]t's reached the point where opposite results can be reached in

cases nearly identical in their factual scenarios depending on whether the case is tried in federal or state court." Hank Grezlak, *Federal, State Court At Odds On Spoliation*, PENNSYLVANIA LAW WEEKLY, Jul. 22, 1996, at 1 (noting that state courts are more likely to dismiss cases involving allegations of spoliation, while federal courts may impose sanctions but will probably permit the claims to survive). It follows that forum shopping, rather than the United States Constitution, affords alleged spoliators more protection.[6] *Compare Sonmez v. World on Columbus, Inc.*, 261 A.D.2d

6. Indeed, the individual petitioners, through their interests in another entity, have suffered from judicial inconsistencies. In the instant action, petitioners' claims were dismissed due to allegations that they spoliated tapes. In a separate action pending in federal court, an entity in which the individual petitioners here hold an indirect interest, was denied an opportunity to prove its claims due to its adversaries' destruction of key documents and the federal courts' refusal to impose any sanctions due to that alleged spoliation. *Compare Sage v. Proskauer*, 275 A.D.2d 11, 16-17 (1st Dep't 2000), *with John St. Leasehold, LLC v. Capital Mgmt. Res., L.P.*, 154 F. Supp. 2d 527, 541 (S.D.N.Y. 2001), *aff'd*, No. 01-6096, 2002 U.S. App. LEXIS 2348 (CA2 Feb. 13, 2002).

The *John Street* case involved claims arising out of the foreclosure of property owned by plaintiff John Street Leasehold LLC ("John Street"), a company in which petitioners Melvyn Kaufman and Robert Kaufman hold an indirect interest. 154 F. Supp. 2d at 536. A defendant bank officer, who was involved in determining whether to foreclose on the John Street property, admitted under oath that, while litigation was pending, he destroyed all of his reading and correspondence files and everything in his possession concerning the property. In determining whether to apply an adverse inference against defendants in *John Street*, the Southern District noted that the inference could apply when relevant evidence is destroyed intentionally, or in a grossly negligent manner. *Id.* at 541. The *John Street* court considered whether there was evidence that the destroyed documents were relevant to the material issues in the case and whether defendants had an obligation to preserve the documents at the time of destruction. *Id.* at 541.

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199, 199 (1st Dep't 1999), *with Gordon v. State Farm Ins. Co.*, 700 So. 2d 1117, 1119-20 (La. Ct. App. 1997).

While certain federal and state courts are failing to satisfy the minimum requirements of due process on spoliation motions, other federal courts have held that the more rigorous clear and convincing standard of proof must be met in establishing spoliation. *See Shepherd v. American Broad. Cos.*, 62 F.3d 1469, 1472 (D.C. Cir. 1995); *Danis v. USN Communications, Inc.*, No. 98 C 7482, 2000 U.S. Dist. LEXIS 16900, at *103 (N.D. Ill. Oct. 20, 2000); *Gates Rubber Co. v. Bando Chem. Indus.*, 167 F.R.D. 90, 108 (D. Colo. 1996); *see also Wilson v. Volkswagen of Am., Inc.*, 561 F.2d 494, 505 (CA4 1977), *cert. denied*, 434 U.S. 1020 (1978). Because spoliation motions often involve "'allegations of fraud or some other quasi-criminal wrongdoing,'" the *Shepherd* court noted that requiring the movant to meet an elevated standard of proof would "'reduce the risk to [the party] of having his reputation tarnished erroneously. . . .'" *Shepherd*, 62 F.3d at 1477 (*citing Addington v. Texas*, 441 U.S. 418, 424 (1979)).

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In contrast, the Appellate Division in the instant action concluded that the discarded tapes were relevant based on an inference, not based on separate evidence of relevancy. The Appellate Division in this case also inferred from the circumstances of destruction that it was done in "bad faith." (App. at 8a-11a.) In *John Street*, the Southern District refused to impose any sanctions on defendants, and the Second Circuit affirmed. 154 F. Supp. 2d at 541 n.3; 2002 U.S. App. LEXIS 2348, at *7. Without these files, which were new evidence, or an appropriate sanction, John Street could not prove its case and summary judgment was entered against John Street and in favor of defendants. 541 F. Supp. 2d at 552, 541. Thus, the individual petitioners here have been deprived of the opportunity to prove claims in a lawsuit due to spoliation not once, but twice, as a result of the courts' inconsistent application of the law regarding spoliation.

In addition to addressing due process issues, courts must decide which matters raise issues of law that the court may determine, and which raise questions of fact that should rightfully be submitted to the jury. *Compare Minnesota Mining & Mfg. Co. v. Pribyl*, 259 F.3d 587 (CA7 2001), *with Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 157 (CA4 1995). Resolution of spoliation motions has resulted in satellite litigation that may "overwhelm the original litigation and [have] the potential to impose significant burdens on judicial administration." Kindel, *Spoliation of Evidence*, 27 WM. MITCHELL L. REV. at 706 (citing *Gates Rubber Co.*, 167 F.R.D. at 90). Spoliation motions touch upon evidentiary issues, discovery obligations, document retention policies, and access to electronic information and computer records.

Despite the prominence of spoliation as a recurring issue facing American jurists, there is no current spoliation decision of this Court. Because the law governing spoliation is evolving and the lower courts are crafting new remedies that have not been subjected to judicial scrutiny; because spoliation affects constitutional rights; and because spoliation case law is confusing, irreconcilable and lacking in uniform standards, this petition should be granted.

II. This Court Should Grant Review To Resolve A Split Of Authority Concerning Due Process Rights

This Court should grant review to resolve a well-developed conflict among the circuit courts of appeals and the state courts of last resort as to whether due process requires that an evidentiary hearing be conducted where disputed factual issues are raised on a motion to dismiss due to alleged spoliation. There exists a similar split of authority as to whether due process requires that facts relating to the adverse inference must be submitted to the jury or, at a minimum, determined by the court after an evidentiary hearing.

A. There Is A Split of Authority Regarding When Due Process Requires An Evidentiary Hearing

At least one circuit court of appeals has upheld an order dismissing plaintiff's claims due to spoliation of evidence where no evidentiary hearing was conducted to resolve the disputed issues of fact. *See Silvestri v. General Motors Corp.*, 271 F.3d 583 (CA4 2001). As in *Silvestri*, courts in Florida, Michigan, Nevada, New Jersey, and New York,[7] have dismissed causes of action, even where disputed issues of fact were raised, without conducting an evidentiary hearing. *See Torres v. Matsushita Elec. Corp.*, 762 So. 2d 1014, 1015-16, 1018 (Fla. Dist. Ct. App. 2000); *Babe Elias Builders, Inc. v. Pernick*, 765 So. 2d 119, 119, 121 (Fla. Dist. Ct. App. 2000); *DeLong v. A-Top Air Conditioning Co.*, 710 So. 2d 706, 707 (Fla. Dist. Ct. App. 1998); *Tait v. Chrysler Corp.*, No. 178254, 1996 Mich. App. LEXIS 1491, *3-6 (Mich. Aug. 20, 1996) (unpublished); *Stubli v. Big D Int'l Trucks, Inc.*, 810 P.2d 785, 787-88 (Nev. 1991); *Weiss v. Connecticut Mut. Ins. Co.*, 287 A.D.2d 400, 401 (1st Dep't 2001); *Sonmez*, 261 A.D.2d 199, 199 (1st Dep't 1999); *Squitieri v. City of New York*, 248 A.D.2d 201, 203-04 (1st Dep't 1998); *Kirkland v. New York City Hous. Auth.*, 236 A.D.2d 170, 176

7. Pursuant to New York State procedure, sanctions may be issued for the mere violation of a discovery notice. *See* CPLR 3126. Conversely, under Rule 37, a court may impose sanctions only if a litigant disobeys a previously issued court order. FRCP 37(b)(2)(C). Although federal courts may sanction conduct that is not violative of a court order based on their inherent authority, *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-45 (1991), on a spoliation motion in federal court, there often is a prior order determining what items are relevant. In contrast, on a spoliation motion in New York, it is likely that the first time issues regarding the relevancy of requested items are raised is on the motion to dismiss, after the alleged spoliation has occurred. In the instant action, when Mr. Kaufman discarded the irrelevant tapes, there was no court order requiring him to retain or produce any tapes, and certainly no order requiring him to retain or produce tapes unrelated to the transaction.

(1st Dep't 1997); and *Aetna Life & Cas. Co. v. Imet Mason Contractors*, 707 A.2d 180, 185-86 (Sup. Ct. N.J. App. Div. 1998).

Conversely, courts in virtually every other circuit and courts in several states have required that hearings be conducted before ruling on spoliation motions, or have submitted factual issues relating to spoliation to the jury. *Nation-Wide Check Corp. v. Forest Hills Distribs., Inc.*, 692 F.2d 214, 216-20 (CA1 1982) (Breyer, J.); *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779, 781 (CA2 1999); *Complaint of Consolidation Coal Co.*, 123 F.3d 126, 137 (CA3 1997), *cert. denied*, 523 U.S. 1054 (1998); *Reddin v. Robinson Prop. Group, L.P.*, 239 F.3d 756, 759 (CA5 2001); *Austral-Pacific Fertilizers, Ltd. v. Cooper Indus., Inc.* Nos. 95-4255/95-4287, 1997 U.S. App. LEXIS 5383, at *6-12 (CA6 Mar. 18, 1997) (unpublished); *Marrocco v. General Motors Corp.*, 966 F.2d 220, 221, 223-24 (CA7 1992); *Keefer v. Provident Life & Accident Ins. Co.*, 238 F.3d 937, 940-41 (CA8 2000); *Jordan F. Miller Corp. v. Mid-Continent Aircraft Serv., Inc.*, No. 97-5089, 1998 U.S. App. LEXIS 2739, at *8, 22 (CA10 Feb. 20, 1998) (unpublished); *Gratton v. Great Am. Communications*, 178 F.3d 1373, 1375 (CA11 1999); *Shepherd v. American Broad. Cos.*, 62 F.3d 1469, 1472, 1484 (D.C. Cir. 1995); *Iverson v. Xpert Tune, Inc.*, 553 So. 2d 82, 84 (Al. 1989); *Souza v. Fred Carries Contracts, Inc.*, 955 P.2d 3, 7 (Az. Ct. App. 1997); *R.S. Creative, Inc. v. Creative Cotton, Ltd.*, 89 Cal. Rptr. 2d 353, 360 (Cal. Ct. App. 1999); *R.A. Siegel Co. v. Bowen*, 539 S.E.2d 873, 877 (Ga. Ct. App. 2000); *Graves v. Daley*, 526 N.E.2d 679, 680 (Ill. App. Ct. 1988); *Brown v. Hamid*, 856 S.W.2d 51, 55 (Mo. 1993); *Morris v. Rickel Home Cntrs.*, 27 Phila. 293, 296, 308-09 (Common Pleas Ct. Phila. County 1993).

Following New York precedent, the New York supreme court in this case wrote that "'[p]laintiffs were not entitled

to a fact-finding hearing to determine the nature of [the] documents they wrongfully discarded.'" (App. at 16a (quoting *Sonmez*, 261 A.D.2d at 199).) The supreme court so held even though the affidavits and deposition testimony submitted by Proskauer and petitioners raised issues of fact as to whether, excluding the records of the nineteen taped telephone conversations petitioners did produce, any other relevant telephone conversations concerning the transaction occurred and were taped. (N.Y.R. at AR307-317; AR1645-1888; AR3121-59; AR2619-22; AR21-23; AR2713-54.) This was a gross violation of due process.

The Court of Appeals for the Sixth Circuit succinctly stated the rationale for conducting a hearing:

> when there is a factual dispute as to whether actual prejudice has resulted from a loss of evidence, the trial court should allow the plaintiffs an opportunity to rebut the presumption against them before determining what sanction is appropriate. The legal system's reluctance to resort to dismissal of an action, both under federal and Ohio state law, mandates that the court gather all relevant facts before imposing so extreme a sanction.

Austral-Pacific Fertilizers, 1997 U.S. App. LEXIS 5383, at *12 (citation omitted); *Litton Sys., Inc. v. Ssangyong Cement Indus. Co.*, Nos. 96-1034, 96-1047, 1997 U.S. App. LEXIS 2386, at *18-19 (Fed. Cir. Feb. 13, 1997) (unpublished); *Shepherd*, 62 F.3d at 1472.

Moreover, in a series of cases not involving spoliation, this Court has opined that "there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." *Societe*

Internationale Pour Participations Industrielle et Commerciales, S.A. v. Rogers, 357 U.S. 197, 209 (1958) (citing *Hovey v. Elliott*, 167 U.S. 409, 413-14 (1897) and *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 349-51 (1909)). In *Societe Internationale*, this Court applied its holdings in *Hovey* and *Hammond*. *Societe Internationale*, 357 U.S. at 209-10. In *Hovey*, this Court concluded that striking defendants' answer, without a hearing, because defendants had been held in contempt for violating a court order was a denial of due process. *Hovey*, 167 U.S. at 413-14. In contrast, in *Hammond*, this Court held that striking defendant's answer was not violative of due process because defendant, after an opportunity to be heard, had been ordered to produce documents in its possession and had failed to do so. *Hammond*, 212 U.S. at 337-40.

Petitioners submit that the holdings in *Societe Internationale*, *Hovey*, and *Hammond* turn on the due process rights to a fact-finding hearing. In the Fourth Circuit, Florida, Michigan, Nevada, New Jersey, and New York, litigants accused of spoliation, including petitioners here, have been denied the opportunity to establish at an evidentiary hearing facts relating to spoliation, including whether spoliation ever occurred or, if it did, whether it was done in bad faith. *See Silvestri*, 271 F.3d at 589-94; *Torres*, 762 So. 2d at 1016-18; *Babe Elias Builders*, 765 So. 2d at 120-21; *Tait*, No. 178254, 1996 Mich. App. LEXIS 1491, *3-6; *Stubli*, 810 P.2d at 787-88; *Weiss*, 287 A.D.2d at 401; *Sonmez*, 261 A.D.2d at 199; *Squitieri*, 248 A.D.2d at 202-04; and *Aetna*, 707 A.2d 185-86. Lacking a clear record of the facts regarding spoliation, in these jurisdictions, courts are dismissing claims "without affording a party the opportunity for a hearing on the merits . . ." as due process requires. *Societe Internationale*, 357 U.S. at 209. This Court should grant certiorari to clarify that the *Societe Internationale*, *Hovey* and *Hammond* holdings relating to due process rights apply with equal force to spoliation motions.

B. There Is A Split of Authority As To When The Adverse Inference Should Apply

In this case, the New York courts refused to conduct a fact-finding hearing to satisfy the dictates of due process and, instead, misapplied the adverse inference as an apparent substitute for due process. (App. at 1a-20a.) This faulty application of the adverse inference denied petitioners their due process rights to a hearing. The errors of the New York courts provide a stark example of the confusing state of the law relating to the adverse inference, which is frequently used as a remedy on spoliation motions.

When employing the adverse inference, many courts instruct the jury that, should it find that the alleged spoliator discarded relevant information, then it may draw an inference that the destroyed items were adverse to that alleged spoliator. *Nation-Wide*, 692 F.2d at 216; *JOM, Inc. v. Adell Plastics, Inc.*, 193 F.3d 47, 50-51 (CA1 1999); *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 155-57 (CA4 1995); *Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119, 1135-36 (CA7 1987), *cert. denied*, 485 U.S. 993 (1988); *Burris v. Kay Bee Toy Stores*, C.A. No. 96C-01-036, 1999 Del. Super. LEXIS 536, at *2-3 (Del. Super. Ct. Sept. 17, 1999); *McLain v. Taco Bell Corp.*, 527 S.E.2d 712, 715-19 (N.C. Ct. App.), *review dismissed*, 221 S.E.2d 564 (2000); *Estate of Holmes v. Boyle*, 56 P.2d 1333, 1335-36 (Colo. 1936); *Linnen v. A.H. Robins Co.*, No. 97-2307, 1999 Mass. Super. LEXIS 240, at *27-33 (Mass. Super. Ct. June 15, 1999); *DiLeo v. Nugent*, 592 A.2d 1126, 1131-32 (Md. Ct. Spec. App.), *cert. granted*, 599 A.2d 90 (1991).

In contrast, other courts refuse to draw an inference at all, even though there is evidence that relevant information was destroyed. *Rummery v. Illinois Bell Tel. Co.*, 250 F.3d 553, 558-59 (CA7 2001); *Minnesota Mining & Mfg. Co.*,

259 F.3d at 606 n.5; *Brewer v. Quaker State Oil Ref. Corp.*, 72 F.3d 326, 334 (CA3 1995); *Milbourn v. Marriott*, CA No. 94-35142, 1995 U.S. App. LEXIS 26711, at *5-6 (CA9 Sept. 15, 1995) (unpublished); *Akiona v. United States*, 938 F.2d 158, 160-61 (CA9 1991), *cert. denied*, 503 U.S. 962 (1992); *Gumbs v. International Harvester, Inc.*, 718 F.2d 88, 96-99 (CA3 1983); *Rodriguez v. Schutt*, 896 P.2d 881, 883, 885 (Co. Ct. App. 1994), *cert. granted*, 914 P.2d 921 (Colo. 1995), *aff'd in part, rev'd in part on other grounds*, 914 P.2d 921 (Colo. 1996).

Still others have held that the court, not the jury, may determine the facts relating to the alleged spoliation. *See Caparotta v. Entergy Corp.*, 168 F.3d 754, 756 (CA5 1999) (reversing a jury verdict for plaintiff and remanding for a new trial because plaintiff presented evidence to the jury of defendant's inadvertent destruction of documents); *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 925 (CA1 1988) (denying plaintiff's motion for a new trial and remanding for an evidentiary hearing before the court, not the jury, to determine the effect of defendant's failure to produce a report relevant to plaintiff's case, which plaintiff discovered for the first time after trial and after entry of judgment for defendant), *on remand*, 127 F.R.D 1 (D. Mass. 1989), *cert. denied*, 498 U.S. 891 (1990).

Furthermore, it is not settled what conduct warrants imposition of the adverse inference and submission to the jury of the facts relating to the inference. For example, the Second Circuit Court of Appeals has held that the adverse inference should apply when relevant material was destroyed intentionally, *Kronisch v. United States*, 150 F.3d 112, 126-28 (CA2 1998), or due to gross negligence, *Reilly v. NatWest Mkts. Group, Inc.*, 181 F.3d 253, 267 (CA2 1999), *cert. denied*, 528 U.S. 1119 (2000), or in bad faith. *Cf. Altschuler v. University of Pa. Sch. of Law*, No. 99-7423, 1999 U.S. App. LEXIS 34303, at *7 (CA2 Dec. 27, 1999), *cert. denied*, 530 U.S. 1276 (2000) (unpublished); *West*, 167 F.3d at 779 (citations omitted). But

the Second Circuit recently implied that the district court may provide an adverse inference instruction to the jury even in the *absence* of a finding of intentional, grossly negligent or bad faith destruction. *See MacFarlane v. Canadian Pacific Ry. Co.*, 278 F.3d 54, 63 (CA2 2002). In *Macfarlane*, the Second Circuit noted that it "should be enough to show that [defendant] had control of the [missing item] at the relevant times, that the evidence was available and that [defendant] failed or refused to produce this evidence." *Id.* (citations omitted).

The rules applied by other circuit courts as to what conduct justifies applying the inference are similarly in conflict. *See Aramburu v. Boeing Co.*, 112 F.3d 1398, 1407 (CA10 1997) (holding that an adverse inference must be predicated on bad faith and mere negligence is not enough); *Glover v. BIC Corp.*, 6 F.3d 1318, 1329-30 (CA9 1993) (reversing and remanding because the ambiguous jury instruction might have caused the jury to believe that a finding of bad faith was a prerequisite to drawing an adverse inference).

Thus, there is no clear statement of the law regarding the adverse inference. It is impossible to state with certainty when the adverse inference applies, what conduct triggers the use of the inference, or whether the court or the jury should determine the disputed facts.

These conflicts concerning the due process implications of the fact finding hearing and the adverse inference are ripe for resolution.

CONCLUSION

The petition for a writ of certiorari should be granted.

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APPENDIX A — DECISION AND ORDER OF THE APPELLATE DIVISION OF THE STATE OF NEW YORK FOR THE FIRST DEPARTMENT, DATED AND ENTERED SEPTEMBER 7, 2000

SUPREME COURT, APPELLATE DIVISION
First Department, February 2000

Milton L. Williams, J.P.,
Peter Tom
Alfred D. Lerner
Richard T. Andrias
David Friedman, JJ.

Sage Realty Corporation, et al.,

Plaintiffs-Appellants,

-against-

Proskauer Rose LLP, et al.,

Defendants-Respondents.

Plaintiffs appeal from an order of the Supreme Court, New York County (Sheila Abdus-Salaam, J.), entered February 17, 2000, which, to the extent appealed from, granted the motion of defendants to dismiss the complaint.

* * *

Appendix A

TOM, J.

The issue before us is whether plaintiffs intentionally and in bad faith destroyed tape recordings relevant to their claims and, if so, what is the proper remedy for plaintiffs' spoliation of evidence.

Defendant Proskauer was legal counsel for Robert and Melvyn Kaufman in connection with a complex mortgage-backed securities transaction. The Kaufman brothers were principals of plaintiff Sage Realty Corporation and various related real estate entities that are parties to the present action. Defendant Nomura Securities International ("NSI") acted as broker-dealer and Proskauer acted as the plaintiffs' legal advisor. The purpose of the transaction was to refinance certain real estate holdings and to thus acquire new equity capital. The loan portion of the transaction closed on February 9, 1995; the securitization portion of the transaction took place on April 4, 1995. Plaintiffs contend that their goal was to enter into only leasehold, and not fee, mortgages.

In 1996, plaintiffs discharged Proskauer. The discharge led to some initial litigation over Proskauer's retention of its work product documentation (*Sage Realty Corp. v Proskauer Rose LLP.*, 91 NY2d 30), and plaintiffs hired Nixon Peabody. Plaintiffs then sued Proskauer and NSI in the present case, asserting claims sounding in legal malpractice, breach of fiduciary duty and breach of contract, in connection with the terms of the transaction. Generally, plaintiffs, experienced real estate businessmen, contended that defendants had failed to explain numerous loan documents to plaintiffs, failed to ensure that only leasehold mortgages were created, failed to

ensure that the defeasance provisions of the transaction worked as intended, and generally failed to advise, and that Proskauer failed to reveal a putative conflict in that it had represented NSI in another matter. Defendants, though, claim that the fee mortgage and defeasance matters were amply discussed in many conversations with plaintiffs' principals, who were advised of all relevant aspects of the transaction.

Defendants' initial motion for summary judgment was denied pending further discovery. During discovery, defendants demanded production of the tape recordings that are presently in issue. The Kaufmans concede, as they must, that they and other senior executives tape recorded business discussions with other parties, including their counsel, regarding complex or important matters, with the result that hundreds of tapes were stored in Melvyn Kaufman's office. Among those recordings were tapes pertaining to discussions with defendants regarding this transaction. Obviously, to the extent that defendants' advice to plaintiffs was thus memorialized on tape, that advice has critical importance to the basic thrust of plaintiffs' entire complaint that the necessary advice was not imparted. Apparently, though, plaintiffs were less than willing to release the tapes.

When plaintiffs received the demands during April and May 1999, their first response was that compliance would be unduly burdensome, but that they would try to locate "any non-privileged, relevant recordings of telephone or other conversations specifically responsive to [the] demand." Defendants subsequently had to demand the tapes again, and plaintiffs again responded that they were trying to locate them. During a one-week period at the end of June 1999, on

the eve of depositions, three batches of tapes were produced totaling 13 tapes (eventually two more were produced) encompassing 16 conversations. With the exception of one tape, these conversations did not allude to the fee mortgage or defeasance issues that were being litigated, and as to that one, as the IAS court indicated, Melvyn Kaufman seemed surprised that it even existed. Three tapes recorded conversations with Proskauer employees and two contained conversations with NSI employees. Yet defendants claimed to have had numerous other conversations with plaintiffs. When defendants requested further tapes, plaintiffs' counsel responded that they were not aware of any more.

As a result, Proskauer refused to produce its first witness for depositions. Defendants moved to compel production of all relevant tape recordings, and plaintiffs cross-moved to compel Proskauer to produce purportedly missing work product files. In connection with the motions, Melvyn Kaufman submitted an affidavit averring his familiarity with the legal requirement that relevant evidence may not be destroyed or altered in anticipation of litigation, that plaintiffs and their employees had "extensively, thoroughly and diligently" searched for, and located, over several weeks "all available tape recordings and transcriptions of tape recordings sought by the defendants to be produced to them," and that all tapes had been turned over to counsel. Kaufman also averred that "[t]o the best of my knowledge, no such tape recordings or transcripts were so destroyed or altered. Also, I am not aware of any requested tape recorded conversation not located and produced . . . and therefore, I do not believe any tape was even inadvertently discarded or altered." The IAS court then directed depositions on the issue whether tapes were altered or destroyed.

Appendix A

After initially failing to respond to interrogatories as to the taping process and who would be knowledgeable, plaintiffs, under court order, provided a very short list of individual names - five besides the Kaufmans. However, they omitted the names of former personnel who had been primarily responsible for filing and maintaining the tapes. The court then ordered a more complete answer, so that plaintiffs now supplied a very long list of names - 159 - of personnel who might know something, but omitted any description of how each individual might have been involved in recording or filing tapes, or how they could be located, insofar as all addresses and phone numbers were also omitted. At the depositions, plaintiffs' witnesses were directed by counsel not to answer questions regarding whether certain conversations were taped. The dodging and weaving by now was blatant.

Several former employees provided testimony on this issue significantly at variance with plaintiffs' position and especially undermining key aspects of Kaufman's affidavit. Former personnel established that the protocol was to tape all conversations, including telephone conversations. Although one witness described the taping as selective rather than routine, that person recalled that Melvyn had had phone conversations regarding the securitization transaction. Another former employee recalled witnessing Melvyn having numerous phone conversations regarding that transaction, during which the mortgage of fee interests was discussed, and that she had listened to a dozen, or perhaps fewer, tapes relating to those conversations. Melvyn Kaufman's secretary testified that she had taped "several" conversations on a daily basis during the relevant time period, and that from 1994 to

1996, covering the time period of Proskauer's representation of plaintiffs giving rise to the underlying dispute, 3 or 4 file cabinets, each holding about 100 tapes with more piled on top, were located in Kaufman's office; some of these were Proskauer tapes. To her knowledge, none had been discarded when she left that employment. However, another employee recalled that several tapes were disposed of during the summer of 1999 - the coincidence of the timing is, of course, remarkable.

Melvyn Kaufman also was deposed. He admitted extensive taping over a ten-year period, ostensibly as a memory device for him and his brother, and that he intended that all conversations regarding the securitization transaction be recorded. He also admitted that the defeasance provisions, and that the fee not be mortgaged, were of paramount importance, but testified that, nonetheless, only one tape was produced and as to that one, "I don't even know where the hell that came from . . .". He claimed that all such conversations occurred in person, rather than by telephone, and that they were not recorded. He repeated that all relevant tapes were produced and none were destroyed. His "diligent" and "thorough" search took five minutes; he, not counsel, preliminarily determined what was relevant, which is somewhat at variance with his averment that all tapes were provided to counsel. With regard to the important claim in his affidavit regarding preservation of evidence, Kaufman initially testified that he probably had destroyed tapes, some probably relating to the securitization transaction, in 1995 as part of a general housecleaning, but that no tapes were destroyed during the summer of 1999. However, when presented with some of the above noted employee testimony, he admitted going

through and discarding many tapes during June 1999 "within a day or two" after sending some tapes to his attorney in response to the discovery demand. About 20 tapes were brought home before being destroyed so that no one could recover them from the office trash. However, he reiterated that these tapes were not relevant to the discovery demand, although he also admitted that no one but him listened to the tapes to establish their contents and relevancy. Nor did plaintiffs seek a protective order or other judicial intervention to isolate only relevant material for purposes of discovery.

On the basis of this testimony, defendants moved to dismiss the complaint insofar as they were severely prejudiced by plaintiffs' spoliation of relevant evidence. In opposition, plaintiffs argued the lack of relevance and, ironically, relied on the absence of evidence that the tapes were relevant. The IAS court granted defendants' motion, except for the conflict claim that we do not presently reach, and granted defendants' attorneys' fees request. In reaching its conclusion, the IAS court relied on the uncontroverted evidence noted above, including Kaufman's own testimony, and his admitted conduct of destroying numerous tapes at such a critical point in time without even advising his attorney of such destruction of potential evidence to ascertain its evidentiary value and hence whether the tapes were within the scope of pending discovery orders. This conduct, while not of itself dispositive on the narrow issue of relevance, nevertheless was so highly dubious as to cast doubt on Kaufman's protestations that all relevant information had been disclosed. As a result, the IAS court rejected plaintiffs' contention that defendants had failed to come forward with adequate evidence establishing that the destroyed evidence, in fact, was relevant to the underlying

litigation, a burden rendered impossible to satisfy as a result of plaintiffs' own misconduct.

Whether we review on the basis of the common-law doctrine of spoliation, allowing dismissal when key evidence is destroyed prior to examination by the opposing party, in which case willfulness or bad faith may not be necessary predicates (*see, Squitieri v City of New York*, 248 AD2d 201), or on a proper exercise of the court's discretion under CPLR 3126, addressing willful conduct by a nondisclosing party, we agree with the disposition of the IAS court.

Plaintiffs' main defense to dismissal, in fact to the imposition of any sanctions, is the conclusory claim that the tapes were not relevant to the underlying action and, as such, were not discoverable in the first place. The sheer effrontery of this claim, in view of Kaufman's intentional act of destroying the tapes once disclosure became imminent, is amazing. The likely relevance of the destroyed evidence is easily inferred. Basically uncontroverted evidence established that plaintiffs, as a matter of their own policy, taped important business conversations; plaintiffs admitted that the nature of the loan was crucial to the transaction; evidence established that plaintiffs directed that all phone calls in connection with this transaction be recorded or otherwise memorialized; and that Melvyn Kaufman was observed discussing these very matters with defendants on the telephone. Although plaintiffs now complain that relevance cannot be established in the absence of the tapes, it is the peculiarity of many spoliation cases that the very destruction of the evidence diminishes the ability of the deprived party to prove relevance directly, so that plaintiffs' objection will not, under these circum-

stances, impede a finding of relevance (*Sonmez v World on Columbus*, 261 AD2d 199; *Marrocco v General Motors Corp.*, 966 F 2d 220, 223).

We also conclude that the destruction of the tapes was done in bad faith, an inference also circumstantially supported by the nature of Kaufman's conduct and the timing (CPLR 3126; *Sonmez v World on Columbus, supra; cf., Christian v City of New York*, __ AD2d __, 703 NYS2d 5). Again, the record clearly supports this conclusion. Evidence by former employees established that "hundreds" of tapes were present in his office when this litigation commenced, and that they no longer existed during the time period the discovery dispute was occurring. Kaufman himself admitted taking home several tapes with the expressed intention of destroying them. This indication of bad faith is buttressed by Kaufman's failure to take even the elementary precaution, knowing that tapes were being sought, of delivering the tapes to counsel or having a third party verify their lack of relevance prior to their destruction. This record also clearly indicates that, given the singularity of this evidence (*see, DiDomenico v C & S Aeromatik Supplies*, 252 AD2d 41), defendants are substantially prejudiced in interposing a defense without it.

CPLR 3126 provides that if a party "wilfully fails to disclose information which the court finds ought to have been disclosed . . . the court may make such orders with regard to the failure or refusal as are just . . .". As such, courts have "broad discretion" that must not be disturbed absent "clear abuse" to impose sanctions under CPLR 3126 when a party intentionally, contumaciously or in bad faith fails to comply with a discovery order or destroys evidence prior to an

adversary's inspection (*Puccia v Farley*, 261 AD2d 83, 85; *cf., Hill v Douglas Elliman-Gibbons & Ives*, 256 AD2d 31 *lv. granted* 1999 NY App Div LEXIS 5200). We have recognized that under such circumstances, dismissal may be appropriate as a matter of "elemental fairness" (*Kirkland v New York City Housing Authority*, 236 AD2d 170, 175), especially when the destruction of the evidence is "reprehensible" (*Hyosung [America] v Woodcrest Fabrics*, 106 AD2d 298, *appeal dismissed* 64 AD2d 934). Although we also have recognized that dismissal may be an excessive remedy where the destroyed evidence is not crucial, with prejudice diminished accordingly (*Atlantic Mutual Insurance Co. v Sea Transfer Trucking*, 264 AD2d 659), and other courts have not dismissed when evidence was discarded in good faith, pursuant to normal business practices and in the absence of pending litigation or notice of a specific claim (*Conderman v Rochester Gas & Electric Corp.*, 262 AD2d 1068, 1070), those factors are inapplicable in this case. Rather, dismissal is justified by the deliberate nature of the conduct that effectively impede the ability of the deprived party to assert a claim or a defense (*Hyosung, supra*; David Siegel, Practice Comm., McKinney's Cons. Laws of NY, Book 7B, CPLR 3126:7, pp. 757-758; 6 Weinstein-Korn-Miller, NY Civil Practice, ¶ 3126.04).

Plaintiffs also complain that the IAS court misapplied the burden of proof. Although the party seeking disclosure has the burden to show willfulness by the non-disclosing party, the latter must demonstrate an excuse for its failure to disclose (*Kami & Sons v Pipe*, 248 AD2d 312; *Van Wert v Green-Pepper*, 151 AD2d 839, 841). Plaintiffs contend that defendants fail to prove their willfulness, and that their excuse

adequately satisfies their own responsibility in this regard. Those claims, though, do not comport with the above facts. The excuse, such as it is, is entirely conclusory and even seems contrived to frustrate the discovery request and orders. It was properly rejected by the motion court.

Accordingly, the order of the Supreme Court, New York County (Sheila Abdus-Salaam, J.), entered February 17, 2000, which, to the extent appealed from, granted the motion of defendants Proskauer Rose LLP and Nomura Securities International, Inc. to dismiss the complaint pursuant to CPLR 3126, with the exception of plaintiffs' conflict of interests claims against Proskauer, should be affirmed, with costs.

All concur.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

ENTERED: SEPTEMBER 7, 2000

s/ Catherine O'Hagan Wolfe
CLERK

APPENDIX B — DECISION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK, DATED FEBRUARY 9, 2000 AND FILED FEBRUARY 17, 2000

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

IAS PART 13

INDEX NO. 119772/96

Sage Realty Corporation, et al.,

Plaintiffs,

-against-

Proskauer Rose LLP, et al.,

Defendants.

SHEILA ABDUS - SALAAM, J.:

In this legal malpractice action arising out of a complex real estate transaction in which defendant Proskauer Rose LLP ("Proskauer") was plaintiffs' legal counsel, and defendant Nomura Securities International, Inc. ("Nomura") provided financial advisory services with respect to the structuring of a securitized mortgage transaction, both defendants have moved for an order dismissing the complaint based upon spoliation of evidence.

At issue here is plaintiff Melvyn Kaufman's admitted destruction of tape recordings of telephone conversations after defendants had served a discovery demand for all

recordings pertaining to this transaction, and after plaintiffs had produced 15 tapes[1] in response to that demand. While plaintiffs argue here that the tapes that were destroyed did not relate in any way to the subject of this lawsuit, defendants assert that the circumstances surrounding the destruction of those tapes demonstrate that the tapes were not only relevant but damaging to plaintiffs' case, and that their destruction constitutes willful, bad faith spoliation of evidence which mandates dismissal of the complaint.

Extensive discovery has already been conducted with respect to the spoliation issue. This motion has been fully briefed and argued by all parties. The court has been provided with transcripts of the depositions, as well as videotapes of some depositions, including the one of Melvyn Kaufman. The voluminous papers have been fully reviewed by this court, and Mr. Kaufman's videotaped deposition has been viewed as well.

While it is not entirely clear how many telephone conversations related to the transaction were taped (plaintiffs claim there were only 10 to 20 such tapes while defendants claim there were more than 30), and exactly when such tapes were destroyed, the following is uncontroverted:

1) According to plaintiff Melvyn Kaufman, he, his brother Robert Kaufman and a few senior executives had a practice

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1. These 15 tapes included 16 conversations. In addition plaintiffs produced transcripts of three conversations for a total of 19 recorded conversations. However, as defendants point out only three of those conversations were with Proskauer (one of which occurred after the transaction's closing date of February 8, 1995) and only two were with Nomura.

of tape recording telephone conversations which they believed contained complex or important business information;

2) As of the date that this litigation commenced, Melvyn Kaufman had hundreds of recordings stored in his office, some of which related to the transaction here;

3) Defendants each served a discovery demand — Proskauer's demand is dated April 26, 1999 and Nomura's demand is dated May 17, 1999, — requiring production of all tape recordings of telephone conversations relating to the merits of this lawsuit;

4) In response to the demands, Kaufman produced 15 tape recordings by supplying them to his counsel to be forwarded to defense counsel;

5) Within a day or two after producing the 15 tapes, Melvyn Kaufman threw some tapes in a wastepaper basket in his office and then took approximately 20 more tapes home, where he threw them down the trash chute. When asked by defendant Proskauer at his September 1999 deposition why he had thrown out the tapes, he stated, *inter alia*, that he was "fed up" with tapes being an issue. His explanation for taking the tapes home to discard them was that he "didn't want anybody to see a bundle of tapes which look like music tapes to touch them. So [he] threw them down the chute in [his] apartment house where nobody sees anything" to make sure that they were totally destroyed and "unrecognized";

6) Subsequent to discarding the tapes, Melvyn Kaufman wrote a letter to Proskauer partner Arnold Levine in which he stated, *inter alia*, that ". . . we have sent to you innumerable personal internal conversations, most of which were useless for any purpose except for its [sic] basic purpose which is for my brother to hear what I had to say or for me to hear what he had say [sic] in reference to a phone call."

"It would be sad if this ridiculous posture that your firm's counsel has taken which has *forced us to discontinue the retention of these recordings* so that we will be back one hundred years, where he said you said I said she said." (emphasis supplied);

7) When questioned at his deposition as to whether Proskauer had discussed with plaintiffs, over the telephone, issues relating to the substitution of collateral, Melvyn Kaufman responded as follows: "The only one that gets close to it I think you have but it really doesn't do the job because its [sic] only a beginning start and that was with — oh, your tax counsel here — Ira Akselrad. I think you have that. I think they have that. *I don't even know where the hell that came from* but go ahead." (emphasis supplied).

In considering all of the above, the court recognizes that there is testimony indicating that plaintiffs discarded tape recordings both before this litigation was commenced and before defendants demanded production of relevant recordings. However, the circumstances of Melvyn Kaufman taking tapes home with him and destroying them without even letting his attorneys listen to them on the heels of his selecting other tapes to give to his counsel to produce; his

statement in his letter to Proskauer that it had forced him to discontinue the retention of recordings after defendants' demand for *relevant* recordings; his apparent surprise at his deposition that he had produced *any* recording which related to the issue of substitution of collateral (a central issue in this case); and the no-less-than three different, inconsistent and incredible explanations for when and how he disposed of tapes (which can only be described as a valiant attempt by his attorneys at damage control for Mr. Kaufman's misconduct), considered together, lead this court to draw a "negative inference" (see *DiDomenico v C&S Aeromatick Supplies, Inc.*, 252 AD2d 41, 52, and cases cited therein) and persuade this court that there has been a willful and bad faith destruction of discovery material that ought to have been disclosed (CPLR 3126; see *Sonmez v World on Columbus Inc.*, 261 AD2d 199; *Acolyte Elec. Corp. v City of New York*, 165 AD2d 802; *Anteri v NRS Constr. Corp.*, 117 AD2d 696).

In *Sonmez, supra*, the Appellate Division, First Department addressed precisely this issue of the deliberate destruction of evidence — there, financial records crucial to the defense of the action — and affirmed the dismissal of the plaintiffs' complaint pursuant to CPLR 3126. In response to plaintiffs' argument that defendants had not demonstrated that the documents were relevant to the issues in the case, the Court held that "[p]laintiffs were not entitled to a fact-finding hearing to determine the nature of the documents they wrongfully discarded" (261 AD2d 199).

Like the plaintiffs in *Sonmez, supra*, plaintiffs here argue that defendants have not shown that the tapes Melvyn Kaufman destroyed are relevant to the transaction at issue.

They assert that defendants must demonstrate by direct evidence that the conversations existed and that they were recorded. As one court has recognized in similar circumstances, such proof is impossible:

> We find it ironic that the plaintiffs . . . contend that GM has not adequately explained what [the destroyed evidence] would have shown, for it was the plaintiffs' own misconduct which prevented GM from acquiring that very information. Perhaps that evidence was an irreplaceable part of GM's defense. . . . Then again, perhaps not. But therein lies the prejudice — GM was denied any opportunity to find out one way or the other.

Marrocco v. General Motors Corp., 966 F2d 220, 223 (7th Cir. 1992).

While defendants cannot prove with certainty that the destroyed tapes contained evidence crucial to their defense, or would have led them to uncover proof to establish their defense, such certitude is not possible here, where the tapes no longer exist due to plaintiffs' wrongdoing. The core of the Kaufmans' claim against defendants is that they consistently told defendants that they were unwilling to mortgage fee interests in the properties in order to complete the transaction, and that they were never told that fee mortgages would be required. Plaintiffs also claim that they were not properly advised concerning the defeasance provisions of the loan documents.

Appendix B

In response to defendant Proskauer's earlier motion for summary judgment, and Proskauer's assertion that plaintiffs could not defeat summary judgment because the documentary evidence demonstrates that plaintiffs knew about the mortgaging of the fee interests and the defeasance provisions, plaintiffs argued that the transaction documents and drafts were too numerous and complex for plaintiffs to understand, and that is why plaintiffs relied upon Proskauer. For its part, Proskauer maintained (as it does now) that it had hundreds of conversations with the Kaufmans concerning the fees and the defeasance provisions. Thus, a central element of proof in this case, for all parties, is the parties' conversations and the understandings reached in those conversations. It is not only what was said but the response to what was said that is key. In essence, one of the basic issues of this case is, to paraphrase Sen. Howard Baker in a statement that he made during the Watergate hearings,: What did Melvyn Kaufman know, and when did he know it ?.[2]

In determining the sanction to be imposed upon plaintiffs for what I have concluded was willful and bad faith destruction of discoverable material, I have taken into account that we will now never know what was on the tape recordings that have been destroyed. A preclusion order, which prevents plaintiffs from testifying as to telephone conversations that were had with defendants, or an adverse inference or missing documents charge given at trial are remedies which do not appear to me to be appropriate here, at least not with respect

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2. "What did the President know, and when did he know it?" Howard H. Baker, Jr., quoted in Sam J. Ervin, Jr. *The Whole Truth: The Watergate Conspiracy* 174 (1980) (The Oxford Dictionary of American Legal Quotations, 1993).

to the main aspects of plaintiffs' claims, i.e., the mortgaging of fees and the defeasance provisions. Anything short of dismissal of plaintiffs' complaint (except with respect to the conflict of interest claim) might serve to provide plaintiffs with an unfair advantage in this litigation for what I have determined to be a bad faith destruction of evidence and would put a judicial imprimatur on such conduct (see *DiDomenico v C & S Aeromatick Supplies, Inc.*, 252 AD2d 41, 49 [penalties imposed under CPLR 3126 are designed to "prevent a party who has refused to disclose evidence from affirmatively exploiting . . . the unavailability of the proof"]).

As to plaintiffs' claim that Proskauer engaged in a conflict of interest in representing Nomura at the same time it was representing plaintiffs, the record reveals that even if a tape recording of the conversation between Melvyn Kaufman and Proskauer partner Herbert Weinstein existed during which the alleged conflict of interest was discussed, it would not be crucial either to plaintiffs' prosecution or Proskauer's defense of that claim. In his affidavit dated June 26, 1998 Weinstein, since deceased, avers that:

> By November 3, 1994, I telephoned Melvyn Kaufman to obtain a conflict waiver. I told him that Proskauer represented Nomura in labor/employment and immigration matters. His response, delivered in a tone suggesting that he considered the issue trivial, was in substance, "so what?" I asked Mr. Kaufman whether he wanted Proskauer to continue representing plaintiffs, and told him that I needed to clear the conflict. He responded that it was no problem.

Thus, by his own admission, Weinstein did not tell Kaufman about Proskauer's representation of Nomura on securities matters, and any conflict that may have existed with respect to such matters could not have been waived by Kaufman during that phone call. Thus, as the tape recordings do not impact upon plaintiffs' conflict of interest claim, that portion of the complaint will not be dismissed.

As a result of plaintiffs' willful destruction of evidence, defendants are awarded attorneys' fees for this motion. This matter is referred to a Special Referee to hear and report with respect to the reasonable amount of such fees.

ORDERED that the Clerk enter judgment dismissing the complaint as against defendant Nomura Securities International, Inc.; and it is further

ORDERED that the complaint as against the remaining defendants is dismissed except with respect to the conflict of interest allegations of the complaint.

Dated: February 9, 2000 ENTER

s/ SA-S
J.S.C.

APPENDIX C — DECISION AND ORDER OF THE APPELLATE DIVISION OF THE STATE OF NEW YORK FOR THE FIRST DEPARTMENT, DATED JUNE 21, 2001

Rosenberger, J.P., Williams, Tom, Andrias, Marlow, JJ.

4586

Frank H. Penski

Sage Realty Corporation, et al.,

Plaintiffs-Appellants,

-against-

Leon P. Gold

Proskauer Rose LLP,

Defendant-Respondent,

-and-

Nomura Securities International, Inc.

Defendant.

Order, Supreme Court, New York County (Sheila Abdus-Salaam, J.), entered February 8, 2001, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

In their remaining cause of action for legal malpractice, plaintiffs allege that defendant represented them while laboring under a conflict of interest. Plaintiffs have, however,

failed to offer any proof of damages attributable to the alleged malpractice independent of their claim previously dismissed by reason of their bad faith destruction of evidence (*see, Sage Realty Corp. v. Proskauer Rose LLP*, 275 AD2d 11, 12). Accordingly, the motion court properly dismissed the complaint since plaintiffs were unable to establish a prima facie cause of action for legal malpractice (*see, Matter of Nevelson v. Carro, Spanbock, Kaster & Cuiffo*, 259 AD2d 282, 283).

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

ENTERED: JUNE 21, 2001

s/ Catherine O'Hagan Wolfe
CLERK

APPENDIX D — DECISION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK, DATED JANUARY 29, 2001

PRESENT: Hon. SHEILA ABDUS-SALAAM PART 13
Justice

INDEX NO. 119772/96
MOTION DATE 11/20/00
MOTION SEQ. NO. 025
MOTION CAL. NO. 156

Sage Realty Corporation, The William Kaufman Organization, Ltd., 4 Third Avenue Fee LLC, Water Street Fee LLC, 7 Third Avenue Fee LLC, 7 Third Avenue Leasehold LLC, Water Street Leasehold LLC, Melvyn Kaufman and Robert Kaufman

-v-

Proskauer Rose LLP

* * *

Upon the foregoing papers, it is ordered that this motion by defendant for summary judgment dismissing the verified second amended complaint in its entirety is granted.

In my decision dated February 9, 2000 (affirmed 275 AD2d 11), the complaint was dismissed with the exception of the conflict of interest claim. That dismissal was based upon my determination that plaintiffs had engaged in willful and bad faith destruction of discoverable tape recordings. In

deciding to permit the conflict of interest claim to continue (the pertinent allegations are included in the "parties" portion of the complaint and in the first cause of action labeled "legal malpractice"), I reasoned that even if a tape recording of the conversation between Melvyn Kaufman and Proskauer partner Herbert Weinstein existed during which the alleged conflict of interest was discussed, it would not be crucial to either the prosecution or defense of the conflict of interest claim.

By this summary judgment motion, defendant has demonstrated that the remaining claim should be dismissed because the damages that plaintiffs seek to recover based upon the alleged conflict of interest — compensatory damages and disgorgement of legal fees — are the same damages that were sought to be recovered in the now dismissed legal malpractice claim. As defendant points out, plaintiffs have previously argued to this court, in opposition to defendant's earlier motion for summary judgment, that the conflict of interest claim is inextricably intertwined with the legal malpractice claim. In their memorandum of law opposing that motion, plaintiffs persuasively asserted as follows:

> Proskauer's argument that plaintiffs did not suffer any injury from these conflicts is nothing short of absurd. It is now patently clear that Proskauer did not bother for its own reasons (most likely its lucrative work from NACC and NSI) to explain the key provisions of the loan documents to the Kaufmans *before* closing. As a result, the plaintiffs are stuck in a deal they would never have agreed to had competent, responsible and loyal counsel represented them. The terms of

> the deal Proskauer negotiated for the Kaufmans with its own client, Nomura, have caused plaintiffs extensive and immediate financial injury. [Defendant's Motion, Ex. C]

This explanation by plaintiffs, offered years ago in opposition to a summary judgment motion, provides the rationale for why their conflict of interest claim must now be dismissed, for that claim is grounded upon and linked to the contention that Proskauer did not explain to plaintiffs the key elements of the transaction. Plaintiffs have contended that their damages from the conflict of interest claim consist of being "stuck" in a deal that they would never have agreed to had they been represented by loyal counsel. I dismissed the legal malpractice claim due to plaintiffs' bad faith spoliation of discoverable evidence, noting that a central issue was what Melvyn Kaufman knew, and when he knew it. In reviewing that dismissal, the First Department described plaintiffs' conduct during the spoliation discovery as "blatant" "dodging and weaving" (275 AD2d 11, 713 NYS2d 155, 158). If I were to permit plaintiffs to pursue their claim for damages based upon the alleged conflict of interest, they would effectively be dodging the impact of their bad faith spoliation, and doing an end-run around my prior determination, which has been affirmed. Such a result is not appropriate, as it would be incongruent with the prior findings regarding the proper penalty for willful spoliation of evidence.

Finally, I would also note that plaintiffs' "dodging and weaving" did not end even after I determined that the majority of their complaint should be dismissed due to spoliation. In October 2000, approximately 1½ years after defendant demanded production of all tapes relevant to this lawsuit,

plaintiffs delivered to defendant eighty pages of previously undisclosed tape transcripts concerning what was eventually to be the May 2000 defeasance. According to plaintiffs' counsel, as set forth in his October 31, 2000 letter to defendant, the transcripts were discovered during the course of counsel's review of defeasance documents, and as of that date, plaintiffs had been unable to locate the tapes. Those transcripts were of conversations that took place in March, April and May 1999, after this action was commenced, and around the time that defendant demanded production of the tapes. And yet, as previously noted, plaintiff Melvyn Kaufman has maintained during the course of this litigation that all relevant tapes were produced and none destroyed!

This complex lawsuit, which has been vigorously litigated, and which raises serious allegations of counsel's conflict of interest, will not conclude with a determination on the merits. To the extent that there ever was any substance to the claims asserted by plaintiffs here, it is their actions alone which have brought about the end to this litigation without a trial on the merits. Based upon all of the foregoing, defendant has demonstrated that summary judgment should be granted dismissing the remainder of the complaint.

ORDERED that the Clerk enter judgment dismissing the complaint.

Dated 1/29/01

ENTER: s/ SA-S
J.S.C.

Check one: ☒ FINAL DISPOSITION
☐ NON-FINAL DISPOSITION

APPENDIX E — DECISION AND ORDER OF THE STATE OF NEW YORK, COURT OF APPEALS, DATED SEPTEMBER 6, 2001

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the sixth day of September 2001

Present, HON. GEORGE BUNDY SMITH,
Senior Associate Judge, presiding.

1-10 Mo. No. 638

Sage Realty Corporation, et al.,

Appellants,

v.

Proskauer Rose LLP et al.,

Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is dismissed upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the Constitution.

Chief Judge Kaye took no part.

s/ Stuart M. Cohen
Stuart M. Cohen
Clerk of the Court

Appendix E

STATE OF NEW YORK,
COURT OF APPEALS

Stuart M. Cohen
Clerk of the Court

Clerk's Office
Albany, New York 12207-1095

DECISION September 6, 2001

1-10 Mo. No. 638

Sage Realty Corporation, et al.,

Appellants,

v.

Proskauer Rose LLP et al.,

Respondents.

Motion for leave to appeal dismissed upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the Constitution.

Chief Judge Kaye took no part.

APPENDIX F — DECISION AND ORDER OF THE STATE OF NEW YORK, COURT OF APPEALS, DATED JANUARY 10, 2002

STATE OF NEW YORK, COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the tenth day of January 2002

Present, HON. GEORGE BUNDY SMITH,
Senior Associate Judge, presiding.

1-14 Mo. No. 1319

Sage Realty Corporation, et al.,

Appellants,

v.

Proskauer Rose LLP, et al.,

Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

Chief Judge Kaye took no part.

s/ Stuart M. Cohen
Stuart M. Cohen
Clerk of the Court

Supreme Court, U.S.
FILED
MAY 17 2002
CLERK

No. 01-1541

IN THE

Supreme Court of the United States

SAGE REALTY CORPORATION, THE WILLIAM KAUFMAN ORGANIZATION, LTD., 4 THIRD AVENUE FEE LLC, WATER STREET FEE LLC, 7 THIRD AVENUE FEE LLC, MADISON AVENUE FEE LLC, MADISON AVENUE LEASEHOLD LLC, 7 THIRD AVENUE LEASEHOLD LLC, 4 THIRD AVENUE LEASEHOLD LLC, WATER STREET LEASEHOLD LLC, MELVYN KAUFMAN and ROBERT KAUFMAN,

Petitioners,

—v.—

PROSKAUER ROSE LLP and NOMURA SECURITIES INTERNATIONAL, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION—FIRST DEPARTMENT

BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

Pursuant to Rule 29.6, the parent corporation of Nomura Securities International, Inc. is Nomura Holding America, Inc. No publicly traded entity owns more than 10% of the shares of Nomura Securities International, Inc.

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JURISDICTION

This Court lacks jurisdiction under 28 U.S.C. § 1257(a) on the ground that the courts below did not consider the "validity of a statute of any State . . . on the ground of its being repugnant to the Constitution, treaties, or laws of the United States," and because no claim of any "title, right, privilege, or immunity . . . under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States" was raised at any time.

STATEMENT OF THE CASE

This action arises from the successful refinancing of certain of Petitioners' commercial properties located in New York City. Proskauer Rose LLP ("Proskauer") represented Petitioners in connection with those transactions. Nomura Asset Capital Corporation, an affiliate of Respondent Nomura Securities International, Inc. ("NSI"), loaned approximately $174 million to certain of the Petitioners in exchange for mortgages on Petitioners' properties. NSI then securitized those mortgages by pooling them with other commercial mortgages and selling interests in the pool to the public. In connection with the securitization transaction, NSI entered into an Investment Banking Engagement Letter with Petitioners Melvyn and Robert Kaufman, pursuant to which NSI agreed to provide "financial advisory services . . . in connection with the structuring of the securitization." Following the successful consummation of the transactions, Petitioners sued Proskauer for malpractice and NSI for breach of the Investment Banking Engagement Letter.

As the opinions below describe (App. at 2a-8a and 12a-16a), this action was dismissed because Petitioner Melvyn Kaufman ("Kaufman") deliberately destroyed relevant discovery materials. Petitioners' brief obfuscates,

disguises, or simply ignores the true facts of Kaufman's destruction of evidence. The Decision of the Supreme Court of the State of New York, County of New York (the "Trial Court") presents the salient facts relating to Petitioners' destruction of evidence. Based on a record that consisted of almost 4,000 pages of exhibits together with 15 cassette recordings, videotapes of the depositions of two key witnesses, including Kaufman, and excerpts from the transcripts of the depositions eleven other witnesses, the Trial Court exercised its discretion pursuant to governing New York law, and determined that "there has been a willful and bad faith destruction of discovery material that ought to have been disclosed." (App. at 16a.) Accordingly, the Trial Court dismissed all of Petitioners' claims against NSI and all of Petitioners' claims against Proskauer (except an alleged conflict of interest claim, which was subsequently dismissed).

The Appellate Division, First Department (the "Appellate Division") unanimously affirmed, holding that the following facts were uncontroverted: (1) Petitioners taped important business conversations; (2) Petitioners admitted that the collateral and prepayment provisions of the loans at issue herein were crucial to them; (3) Petitioners directed that important calls relating to the loan transactions at issue were to be recorded; (4) Kaufman was observed discussing the transactions on the telephone; (5) as of the time this litigation commenced, Kaufman had hundreds of tapes in his office, including tapes relating to the transactions; (6) Kaufman admitted that he destroyed tapes relating to the transactions; and (7) Kaufman admitted discarding tapes within a day after producing others to his counsel. (App. at 5a-7a.)

Significantly, Petitioners fail to tell this Court that the Trial Court found, and the Appellate Division affirmed, that Kaufman secretly destroyed approximately 20 relevant

cassette tapes when their disclosure became imminent by taking them home to his apartment and throwing them down the trash chute where, as he conceded, "nobody sees anything," and then engaged in "blatant" "dodging and weaving" to forestall discovery of his wrongdoing. (App. at 14a; see also App. at 5a, 7a). For the full facts relating to Petitioners' destruction of discovery materials herein, NSI respectfully refers the Court to the decisions of the Appellate Division (App. at 1a-11a) and the Trial Court (App. at 12a-20a).

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Question Presented was Neither Raised in Nor Decided by the Courts Below

Petitioners claim that their Fourteenth Amendment due process rights entitled them to an evidentiary hearing to determine whether destruction of evidence had occurred. Rule 14.1(g)(i) of the Court states in pertinent part that when, as here, certiorari is sought from a judgment or order of a state court, the petition shall contain

> specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (*e.g.*, court opinion, ruling on exception, portion of court's charge and exception thereto, assignment of error), so as to show that the federal question was timely

and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari.

Petitioners fail to comply with this rule because they cannot. The opinions below never considered, let alone decided, any claim that Petitioners were denied their Fourteenth Amendment rights because Petitioners never made such a claim, either in the Trial Court or on appeal to the Appellate Division.[1] Although Petitioners claim that the Trial Court refused to hold an evidentiary hearing at oral argument on Respondents' motion to dismiss the complaint for destruction of evidence (Pet. at 6), the transcript of that argument reveals that Petitioners did not request a hearing at any time. Nor did they claim at any time that their due process rights had been violated. (See N.Y.R. at AR 3716-97.)

"The Court will not decide federal constitutional issues raised here for the first time on review of state court decisions." Cardinale v. Louisiana, 394 U.S. 437, 438 (1969); see also Webb v. Webb, 451 U.S. 493, 496-97 (1981) (noting that "jurisdiction of this Court to reexamine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system"

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[1] Petitioners first raised a due process claim only when they sought discretionary review from the New York Court of Appeals. That court denied their motion for review. Where discretionary review is denied by the court of last resort, the order of the intermediate court is the decision from which review must be sought. 28 U.S.C. § 1257; Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 160 (1954). In any event, Petitioners were not entitled to raise any due process claims with the Court of Appeals because they failed to raise that issue in the courts below. Melahn v. Hearn, 60 N.Y.2d 944, 945, 471 N.Y.S.2d 47, 48 (1983) (holding that constitutional issues not raised below were not preserved for review).

and dismissing writ for want of jurisdiction where lower courts had never considered the question presented) (citations omitted). As the Cardinale Court observed, "there are sound reasons for this. Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind." 394 U.S. at 439. Here, the Trial Court and the Appellate Division never considered Petitioners' Fourteenth Amendment rights because Petitioners never claimed any such rights. Accordingly, the Court is without jurisdiction, and the petition should be denied.

II. There is No Conflict of Authority Concerning Petitioners' Claimed Due Process Rights

Even if Petitioners had properly invoked the jurisdiction of the Court, there would be no reason to grant certiorari because the purported "split" of authority upon which Petitioners ground their request (Pet. at 16-20) does not exist. Petitioners claim that "there is a well-developed conflict among the circuit courts of appeals and the state courts of last resort as to whether due process requires that an evidentiary hearing be conducted where disputed factual issues are raised on a motion to dismiss due to alleged spoliation." (Pet. at 16.) They then cite 27 decisions that purportedly illustrate that "split." (Pet. at 17-18.)

Not a single one of those decisions considers whether "due process requires that an evidentiary hearing be conducted." Rather, the decisions illustrate the oft-cited, consistently applied principle that lower courts should be afforded wide discretion to handle the myriad issues that may arise in connection with discovery. See Cruden v. Bank of N.Y., 957 F.2d 961, 972 (2d Cir. 1992) (district court enjoys wide discretion in handling of pre-trial discovery); Souza v. Fred Carries Contracts, Inc., 191 Ariz. 247, 250, 955 P.2d 3, 6 (1997) ("[a]dopting inflexible 'bright line' rules in this

area, in our view, would be ill-advised. Rather, issues concerning the destruction of evidence and appropriate sanctions therefor should be decided on a case-by-case basis, considering all relevant factors"); Lipin v. Bender, 84 N.Y.2d 562, 571, 620 N.Y.S.2d 744, 747 (1994) (affirming dismissal of complaint and noting that "[s]pelling out the remedies for the limitless potential discovery abuses would not only overwhelm the statute [governing remedies for discovery violations] but also needlessly confine the discretion of courts to tailor the remedy to the problem").

Petitioners' contention that there is a conflict of authority regarding when an "adverse inference" should apply (Pet. at 21-23) is similarly infirm. Although Petitioners cite numerous decisions purporting to illustrate that "split," not a single one considers the "due process implications" (Pet. at 23) upon which Petitioners necessarily rest their claim that their due process rights were violated.[2]

Because the decisions Petitioners cite do not consider any due process right to a hearing, or any due process "implications" of the adverse inference, there is no "well-developed conflict" for the Court to resolve. Accordingly, the petition should be denied.

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[2] Nor have Petitioners properly raised this issue. Their own question presented is confined solely to the issue of whether the Fourteenth Amendment requires an *evidentiary hearing*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 01-1541

Supreme Court, U.S.
FILED
MAY 17 2002

IN THE

Supreme Court of the United States

SAGE REALTY CORPORATION, THE WILLIAM KAUFMAN ORGANIZATION, LTD., 4 THIRD AVENUE FEE LLC, WATER STREET FEE LLC, 7 THIRD AVENUE FEE LLC, MADISON AVENUE FEE LLC, MADISON AVENUE LEASEHOLD LLC, 7 THIRD AVENUE LEASEHOLD LLC, 4 THIRD AVENUE LEASEHOLD LLC, WATER STREET LEASEHOLD LLC, MELVYN KAUFMAN and ROBERT KAUFMAN,

Petitioners,

—v.—

PROSKAUER ROSE LLP and
NOMURA SECURITIES INTERNATIONAL, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE FIRST DEPARTMENT

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED

Should this Court deny the petition for a writ of *certiorari*, in which Petitioners assert that the Due Process Clause of the United States Constitution required an evidentiary hearing on a motion to dismiss Petitioners' complaint as a sanction for their willful destruction of relevant evidence they had an obligation to produce, where (1) Petitioners failed properly to raise in state court the federal constitutional issue on which review is sought, and (2) Petitioners have identified no conflict concerning federal due process requirements in the context of imposing sanctions for spoliation of evidence or even any cases addressing that issue?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Proskauer Rose LLP, formerly Proskauer Rose Goetz & Mendelsohn LLP ("Proskauer"), respectfully submits this brief in opposition to the petition of Sage Realty Corporation and related parties (collectively, "Petitioners") for a writ of certiorari to review the decisions and orders of the Appellate Division Of The Supreme Court Of The State Of New York For The First Department (the "First Department") dated September 7, 2000 and June 21, 2001, which successively dismissed portions of Petitioners' complaint as a consequence of their willful destruction of relevant evidence.

JURISDICTION

This Court lacks jurisdiction under 28 U.S.C. § 1257(a). The state courts below did not consider the "validity of a statute of any State . . . on the ground of its being repugnant to the Constitution, treaties, or laws of the United States," and no claim of any "title, right, privilege, or immunity . . . under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States" was properly claimed or raised below.

COUNTER-STATEMENT OF THE CASE

A. Introduction.

On February 8, 1995, Petitioners closed a complex transaction in which they restructured ownership interests in four Manhattan office buildings, refinanced mortgages on those buildings, and received a new $174 million loan from an affiliate of Nomura Securities International ("NSI"). Proskauer represented Petitioners in this successful transaction, which closed on February 8, 1995.[1] More than two years later,

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[1] At the time of the underlying transaction, Proskauer was known as Proskauer Rose Goetz & Mendelsohn LLP.

Petitioners filed suit against Proskauer for alleged malpractice in connection with the transaction. Petitioners' central allegation was that Proskauer did not advise them that they mortgaged the fee interests (as opposed to the leasehold interests) in the four buildings as part of the transaction. Petitioners also alleged that they never knew of or authorized certain provisions, known as "defeasance provisions," for releasing mortgages and substituting collateral for those mortgages. Finally, Petitioners asserted that Proskauer had an undisclosed conflict of interest.

B. Petitioners Willfully Destroyed Relevant Evidence They Had An Obligation To Produce.

In July 1999, during discovery in the malpractice action, Petitioner Melvyn Kaufman knew that Proskauer was pressing a demand for production of tape recordings of telephone conversations between the parties and others who would be witnesses, all highly relevant to core issues in the lawsuit (*i.e.*, whether Proskauer told Petitioners, and/or Petitioners knew, about the fee mortgages and defeasance provisions). Mr. Kaufman produced a recording of only one telephone conversation with Proskauer contemporaneous with the transaction, although he had many more. Mr. Kaufman threw three or four additional tapes in an office trash receptacle, and took twenty more tapes home to destroy.

He admittedly destroyed these tapes to make certain no one would touch or recognize them, much less hear them, and then claimed they were irrelevant to the litigation. Mr. Kaufman initially told the New York Supreme Court ("the trial court") that he involved his attorneys and others in a diligent search for all relevant tapes before he destroyed them, but discovery established that he and his brother Robert conducted only the most cursory search, and that they did so secretively and alone. In fact, when Mr. Kaufman learned that one relevant recording had actually survived his concerted destruction of tapes, his

candid reaction was: "I don't even know where the hell that came from . . . ." Petitioners' Appendix ("Pet. App.") 6a.

C. The New York Supreme Court's Dismissal Of Virtually All Of Petitioners' Complaint Without Raising Or Deciding Any Due Process Argument

After "fully review[ing]" extensive evidence including the videotape of Mr. Kaufman's deposition, incontrovertibly establishing Mr. Kaufman's deliberate destruction of relevant evidence, and extensive affidavits and briefs, the trial court exercised its discretion pursuant to governing New York law, and ruled as follows:

> [T]he circumstances of Melvyn Kaufman taking tapes home with him and destroying [tapes] without even letting his attorneys listen to them on the heels of his selecting other tapes to give to his counsel to produce; his statement in [a] letter to Proskauer that it had forced him to discontinue the retention of recordings after defendants' demand for *relevant* recordings; his apparent surprise at his deposition that he had produced *any* recording which related to . . . a central issue in this case[]; and the no-less-than-three different, inconsistent and incredible explanations for when and how he disposed of tapes (which can only be described as a valiant attempt by his attorneys at damage control . . .) considered together, lead this court to draw 'negative inference' . . . and persuade this court that there has been a willful and bad faith destruction of discovery material that ought to have been disclosed. . . .

Pet. App. 15a-16a (emphasis in original, internal citations omitted). The trial court accordingly dismissed all of Petitioners' claims against Proskauer (except the alleged conflict of interest claim) and all of Petitioners' claims against

NSI. The trial court chided Petitioners for contending that Proskauer had not demonstrated that the tapes Petitioners destroyed were relevant, noting that such proof "is not possible here, where the tapes no longer exist due to plaintiffs' wrongdoing." Pet. App. 16a-17a.

Petitioners never argued to the trial court that the Due Process Clause mandated that the court conduct an evidentiary hearing before dismissing their claims. Accordingly, the trial court opinion did not discuss or decide that federal constitutional question.

D. The First Department's Affirmance

On September 7, 2000, the First Department unanimously affirmed, holding:

> Plaintiffs' main defense to dismissal, in fact to the imposition of any sanctions, is the conclusory claim that the tapes were not relevant to the underlying action and, as such, were not discoverable in the first place. The sheer effrontery of this claim, in view of Kaufman's intentional act of destroying the tapes once disclosure became imminent, is amazing. The likely relevance of the destroyed evidence is easily inferred.
>
> . . .
>
> We also conclude that the destruction of the tapes was done in bad faith, an inference also circumstantially supported by the nature of Kaufman's conduct and the timing. Again, the record clearly supports this conclusion. Evidence by former employees established that 'hundreds' of tapes were present in his office when this litigation commenced, and that they no longer existed during the time period the discovery dispute was occurring. Kaufman himself admitted taking home several tapes with the expressed intention of destroying them. . . .

> We have recognized that under such circumstances, dismissal may be appropriate as a matter of 'elemental fairness,' especially when the destruction of the evidence is 'reprehensible.'

Pet. App. 8a-10a (internal citations omitted).

On their appeal to the First Department, Petitioners never argued that the trial court's dismissal of virtually all of their complaint without an evidentiary hearing violated the Due Process Clause. Accordingly, the First Department opinion did not address or decide any federal due process right to an evidentiary hearing.

E. The New York Supreme Court's Dismissal Of Petitioners' Remaining Conflict-Of-Interest Claim Without Raising Or Deciding Any Due Process Argument

Once the trial court had dismissed most of Petitioners' claims due to their admitted destruction of relevant evidence, Petitioners were left with a fatally flawed complaint. The court had already dismissed all allegations reflecting any harm or injury Petitioners could possibly have suffered as a result of the alleged conflict of interest. Accordingly, faced with a complaint that alleged wrongdoing but no resulting injury, Proskauer successfully moved for summary judgment. The court held:

> If I were to permit plaintiffs to pursue their claim for damages based upon the alleged conflict of interest, they would effectively be dodging the impact of their bad faith spoliation, and doing an end-run around my prior determination, which has been affirmed. Such a result is not appropriate, as it would be incongruent with the prior findings regarding the proper penalty for willful spoliation of evidence.

Pet. App. 25a. Petitioners once again failed to assert any federal Due Process claim to the trial court before dismissal of the remaining claims in their complaint. The trial court's opinion accordingly did not discuss or decide any federal issue.

F. The First Department's Second Affirmance

By order dated June 21, 2001, the First Department affirmed dismissal of the conflict of interest claim. Reaffirming that Petitioners had engaged in the "bad faith destruction of evidence," the First Department held that, absent damages independent of Petitioners' now-dismissed malpractice claims, their conflict of interest allegations were not legally viable. *See* Pet. App. 22a. Petitioners again failed to argue in the First Department that the Due Process Clause required a hearing prior to dismissal of their claims, and, accordingly, the First Department once again made no reference to any federal due process issue.

G. The New York Court of Appeals' Dismissal, Then Denial, Of Petitioners' Application For Leave To Appeal Without Considering Any Due Process Argument

On Petitioners' motion to the New York Court of Appeals for leave to appeal, the Court of Appeals dismissed Petitioners' initial application on the grounds that "the order sought to be appealed from does not finally determine the action within the meaning of the [New York] Constitution." Pet. App. 27a. Upon Petitioners' renewed motion,[2] the Court of Appeals

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[2] In addition to dismissing most of plaintiffs' claims, the trial court's initial order awarded both NSI and Proskauer their attorneys' fees, as well as their "fees on fees" (representing the amount of money Proskauer and NSI spent to obtain their attorneys' fee awards). Although Petitioners stipulated to withdraw their appeal of the award of attorneys' fees and "fees on fees" as to NSI, they nonetheless

denied, without opinion, Petitioners' application for leave to appeal, in an order dated January 10, 2002. Pet. App. 29a.

It was only in connection with their attempts to seek leave to appeal to the Court of Appeals that Petitioners for the first time mentioned their perceived federal "due process" rights to an evidentiary hearing. As we show below, however, New York law prohibits a party from raising an issue for the first time on appeal to the Court of Appeals. Not surprisingly, the Court of Appeals therefore made no reference to "due process" or to any federal issue in its orders dismissing, then denying, leave to appeal.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE SUPREME COURT LACKS JURISDICTION TO REVIEW THE DECISION OF THE FIRST DEPARTMENT BECAUSE PETITIONERS' DUE PROCESS ARGUMENT WAS NEITHER PROPERLY PRESENTED TO NOR DECIDED BY THE NEW YORK COURTS.

A. The Absence Of Any Decision On Due Process Grounds By Any Of The New York Courts Below Presumptively Establishes That Petitioners Failed To Present A Federal Constitutional Issue In State Court.

The jurisdiction of this Court to review decisions of state courts is conferred by 28 U.S.C. §1257(a), which provides in pertinent part:

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appealed as to Proskauer, which precluded review by the Court of Appeals for want of a "final" appealable order. The First Department ultimately affirmed the award of attorneys' fees to Proskauer, but reversed the award of "fees on fees," thereby resolving the finality issue and prompting Petitioners' second motion for leave to appeal.

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where . . . any title, right, privilege, or immunity is *specially set up or claimed* under the Constitution . . . . [of] the United States.

Rule 14.1(g)(i) of this Court requires a party seeking review of a state court judgment to identify

> the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (*e.g.*, court opinion, ruling on exception, portion of court's charge and exception thereto, assignment of error), so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari.

With "very rare exceptions," Congress has limited this Court's jurisdiction over state court judgments to only federal claims that were "either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (dismissing writ as improvidently granted where petitioner failed to raise federal due process argument in Alabama Supreme Court) (internal punctuation omitted). "[T]he jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Webb v. Webb*, 451 U.S. 493, 496-97 (1981). *See also Cardinale v. Louisiana*, 394

U.S. 437, 438 (1969) ("the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions").

To enforce that limitation, this Court has repeatedly held that "[w]hen the highest state court is silent on a federal question before us, we assume that the issue was not properly presented . . . ." *Adams*, 520 U.S. at 86-87, *citing Board of Dir. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987). *See also Webb*, 451 U.S. at 495-96 ("when the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary"). The assumption that the Petition is not within this Court's jurisdiction is squarely applicable here, because none of the state court decisions below suggests that any federal question was ever presented or decided. *Adams*, 520 U.S. at 86-87; *Webb*, 451 U.S. at 495-96.

B. Petitioners Have Not and Cannot Satisfy Their Burden Of Demonstrating That They Properly Presented Their Federal Due Process Claims To The New York Courts.

Petitioners could overcome their presumptive failure to raise their federal claims in the New York courts only by carrying the "burden of . . . demonstrating that the state court had 'a fair opportunity to address the federal question that is sought to be presented'" to this Court. *Adams*, 520 U.S. at 87, *citing Webb*, 451 U.S. at 501. But they cannot do so, as they have not established "that the claim was raised at the time and in the manner required by the state law," or that "the state procedural requirements could not serve as an independent and adequate state law ground for the state court's judgment." *Id.* (internal citations and punctuation omitted).

Under New York law, an appellate court will not consider an argument that a party fails to raise in the first instance with the trial court. *See, e.g., Colton v. Riccobono*, 67 N.Y.2d 571, 575 (1986) (appellant's "argument was not presented below, and, accordingly, it is not preserved for appeal"); *Cibro Petroleum Prods. Inc. v. Chu*, 67 N.Y.2d 806, 809 (1986) ("[w]e have not considered the constitutional theories newly advanced before us and which plaintiff concedes were not argued to the courts below"); *Kami & Sons, Inc. v. Pipe*, 248 A.D.2d 312, 313 (1st Dep't 1998) (plaintiff's claim that it was denied due process "is improperly raised for the first time on appeal"); *Miller v. Loewenberg*, 75 A.D.2d 620 (2d Dep't 1980) ("[t]he claim that petitioner is entitled to a due process hearing . . . had not been previously raised and will not be considered for the first time on appeal").[3] Having failed to raise any due process claim both in the trial court and the First Department, Petitioners were not entitled to present it to the Court of Appeals, much less to insist that the Court of Appeals' denial of discretionary review operated as a substantive rejection of that claim.

Nor do the pages Petitioners cite from the trial court transcript (Pet. 6) adequately raise any federal claim below, for nowhere did Petitioners mention the words "hearing" or "due process." Even had Petitioners requested a hearing (which they did not), parties routinely request hearings as a matter of state practice or state constitutional law, and such a request in a state court lawsuit is not equivalent to the express assertion of a federal due process right. Without asserting a right to a hearing clearly rooting the right in the federal Constitution, and citing

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[3] Indeed, even if Petitioners had raised a federal issue in the trial court, which they did not, their "failure to raise an issue in [their] appellate brief is tantamount to abandonment or waiver of the issue." *Lehigh Portland Cement Co. v. Town of Catskill*, 263 A.D.2d 558, 560 (3d Dep't 1999).

applicable federal case law, Petitioners could not (and did not) adequately create a federal issue which this Court may review. *See, e.g., Adams*, 520 U.S. at 89 n.3 (even "the passing invocations of 'due process' we found [in Petitioners' Joint Appendix], fail to cite the Federal Constitution or any cases relying on the Fourteenth Amendment, but could have just as easily referred to the due process guarantee of the Alabama Constitution . . . and thus they did not meet our minimal requirement that it must be clear that a *federal* claim was presented") (emphasis in original); *Webb*, 451 U.S. at 496 (vague references to "full faith and credit" in state court proceedings did not satisfy requirements of Supreme Court where "nowhere did she cite to the Federal Constitution or to any cases relying on the Full Faith and Credit Clause of the Federal Constitution"). *A fortiori*, even had Petitioners requested a hearing — without arguing that a hearing is required by the federal Due Process Clause, or that dismissal absent a hearing would violate the Fourteenth Amendment — their request would have been insufficient to vest this Court with jurisdiction.[4]

Petitioners stand in a far weaker position than the *Adams* petitioners, who were denied review on jurisdictional grounds, as Petitioners here never referred to "due process" (much less to the Fourteenth Amendment) in either the trial court or the First Department at all, although the argument was theoretically

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[4] Indeed, Petitioners never clearly presented *any* claim that they were entitled to a hearing, and they misstate the record in asserting that "the New York supreme court explicitly held" that they were not entitled to one. *See* Pet. 8, 18. The trial court did not hold that Petitioners were not entitled to a hearing. The trial court held that because Petitioners themselves had destroyed the tape recordings at issue, they could not complain that Proskauer had not established the materiality of those recordings. *See* Pet. App. 16a-17a.

ripe for the making in the trial court. *Adams*, 520 U.S. at 89 n.3.

Having failed to assert in any way in the trial court or the First Department that the United States Constitution required a hearing prior to dismissal of their claims on spoliation grounds (or that the Constitution would be violated absent such a hearing), Petitioners failed properly and adequately to raise, with "fair precision and in due time," in state court the federal question they now ask this Court to consider. *Adams*, 520 U.S. at 87-88 (Petitioners had "done nothing" to demonstrate why their failure to satisfy Alabama state procedural rules for raising due process argument "would not be an adequate and independent ground for the state court to disregard the claim"); *Webb*, 451 U.S. at 495-96 ("when the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary").[5]

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[5] Without including it in the questions presented, footnote 4 of the petition identifies as a "separate due process violation" an argument that Petitioners were "unfairly disadvantaged" by the recusal of Chief Judge Kaye, whose husband, Stephen Rackow Kaye, is a litigation partner at Proskauer, the Respondent. That issue was never presented to the Court of Appeals. Moreover, the recusal of the Chief Judge, pursuant to New York law and consistent with the Canons of Judicial Ethics and longstanding practice, raises no substantial federal due process question. *See, e.g.*, N.Y. Jud. Law § 14; Rules Of The Chief Administrator Of The Courts § 100.3(E)(1)(d)(i) ("A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including . . . where . . . the judge knows that the . . . judge's spouse . . . is a party to the proceeding . . . [or] has an interest that could be substantially affected by the proceeding.").

Thus, Chief Judge Kaye was required to disqualify herself

II. THERE IS NO CONFLICT ON ANY PERTINENT ISSUE OF FEDERAL CONSTITUTIONAL LAW THAT REQUIRES THIS COURT'S REVIEW.

Petitioners' attempt to fabricate a purportedly "well-developed conflict among the circuit courts of appeals and the state courts of last resort" (Pet. 16) as to whether federal due process requires an evidentiary hearing before dismissal for willful destruction of evidence is entirely without merit. There is no conflict to resolve at all. As we demonstrate below, no case Petitioners cite with respect to this perceived "conflict" of authority even addresses any federal constitutional due process issue in the spoliation context.

A. There Is No Split Of Authority Regarding When Due Process Requires An Evidentiary Hearing.

Despite Petitioners' citation of extensive caselaw from various state and federal courts (*see* Pet. 17-18), in *none* of the decisions Petitioners cite did any court discuss (let alone decide) whether the Due Process Clause of the United States Constitution required an evidentiary hearing prior to dismissal of a complaint for spoliation. Indeed, while some courts have

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since her spouse is a party to this proceeding as a partner of Respondent and for the same reason has an interest that could be substantially affected by the proceeding. Indeed, it certainly would have been unfair and might have been a denial of due process, had she not recused herself. Moreover, in the event of a deadlock or lack of quorum (five judges) in the Court of Appeals, there is a procedure under New York law for substitution of one or more recused judges by appointment of one or more Appellate Division Justices for the case or cases involved, a procedure which, while infrequently invoked, has been used from time to time when necessary. *See, e.g.*, N.Y. Const. Art. VI, § 2. *Microsoft v. United States*, 530 U.S. 1301 (2000) and *Laird v. Tatum*, 409 U.S. 824 (1972), which petitioners cite, are wholly inapposite.

dismissed complaints without discussing whether a hearing was appropriate, *see, e.g., Silvestri v. General Motors Corp.*, 271 F.3d 583 (4th Cir. 2001), and other courts have indicated that a hearing took place, *see, e.g., West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776 (2d Cir. 1999), there is simply no discussion — and therefore no conflicting resolution — of the federal constitutional question whether the Due Process Clause *requires* such a hearing.

Similarly unavailing is Petitioners' invocation of decisions from numerous state courts, *see* Pet. Br. 17-18, none of which addressed issues of *federal* constitutional law under the Due Process Clause. All involved questions of state law insufficient to support this Court's jurisdiction. *See* 28 U.S.C. § 1257(a); *Adams*, 520 U.S. at 89 n.3 (petitioners must "meet our minimal requirement that it must be clear that a *federal* claim was presented") (emphasis in original).

B. The "Adverse Inference" Doctrine Is Not Properly Before This Court And Does Not Present An Issue Of Federal Law.

Nor should the writ issue to clarify the purportedly "confusing state of the law relating to the adverse inference, which is frequently used as a remedy on spoliation motions." *See* Pet. 21. Petitioners contend that "there is no clear statement of the law regarding the adverse inference. . . " (Pet. 23), but a state law issue in a state law case presents no occasion for the Court to address the issue.

On the facts of this case, what Petitioners call the "adverse inference" doctrine implicates no question of federal constitutional law. *See* 28 U.S.C. § 1257(a); *Adams*, 520 U.S. at 89 n.3 (petitioners must "meet our minimal requirement that it must be clear that a *federal* claim was presented") (emphasis in original). None of the cases Petitioners cite discusses (let alone decides) how the Due Process Clause of the United States

Constitution relates to "when the adverse influence applies, what conduct triggers the use of the inference, or whether the court or the jury should determine the disputed facts." *See* Pet. 23.

Even assuming *arguendo* that application of the "adverse inference" doctrine raises an issue of federal constitutional law (which it does not), the First Department did not pass on any such issue, and Petitioners failed to raise it timely below, and this Court is therefore without jurisdiction to consider it now. *See, e.g., Adams*, 520 U.S. at 86-87 ("[w]hen the highest state court is silent on a federal question before us, we assume that the issue was not properly presented . . . .").

CONCLUSION

For each of these reasons, this Court should deny the petition for a writ of *certiorari*.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAY 28 2002
OFFICE OF THE CLERK

No. 01-1541

IN THE

Supreme Court of the United States

SAGE REALTY CORPORATION, THE WILLIAM KAUFMAN ORGANIZATION, LTD., 4 THIRD AVENUE FEE LLC, WATER STREET FEE LLC, 7 THIRD AVENUE FEE LLC, MADISON AVENUE FEE LLC, MADISON AVENUE LEASEHOLD LLC, 7 THIRD AVENUE LEASEHOLD LLC, 4 THIRD AVENUE LEASEHOLD LLC, WATER STREET LEASEHOLD LLC, MELVYN KAUFMAN and ROBERT KAUFMAN,

Petitioners,

v.

PROSKAUER ROSE LLP and NOMURA SECURITIES INTERNATIONAL, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE FIRST DEPARTMENT

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RULE 29.6 STATEMENT

Petitioners' corporate disclosure statement was set forth at page *ii* of the Petition for a Writ of Certiorari, and there are no amendments to that statement.

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Petitioners submit this reply brief in further support of their Petition for a Writ of Certiorari to review the decision and order of the Appellate Division of the Supreme Court of the State of New York for the First Department (the "First Department"), dated September 7, 2000. Petitioners have properly invoked jurisdiction and have presented an important and timely question implicating due process rights in the context of alleged spoliation of evidence that should be resolved by this Court. Respondents' briefs fail to touch upon the central issue — whether, when spoliation is alleged and relevance is a disputed fact, courts must conduct a hearing to comport with due process.

FURTHER REASONS FOR GRANTING THE WRIT

I. Petitioners' Question Presented To This Court Was Pressed And Passed Upon Below

In their Briefs in Opposition, respondents Proskauer Rose LLP ("Proskauer") and Nomura Securities International, Inc. ("NSI") (collectively, "respondents") assert that this Court lacks jurisdiction to review the decision of the First Department because petitioners allegedly failed to argue below, and the courts failed to consider, that petitioners' due process rights under the Fourteenth Amendment of the United States Constitution were violated. (*See* Proskauer's Respondent's Brief in Opposition ("Proskauer Brief" or "Proskauer Br.") at 7-12; NSI's Brief in Opposition ("NSI Brief" or "NSI Br.") at 3-5.) This position lacks merit. Petitioners requested a hearing, the New York supreme court specifically denied that request, and petitioners reiterated, like a refrain, that they were denied due process throughout their appellate briefs. Thus, the violation of petitioners' due process rights was both repeatedly pressed and passed upon at the state level.

This Court is vested with jurisdiction to review a final judgment of a state court "if the record as a whole shows either

expressly or by clear implication that the federal claim was adequately presented in the state system." *Webb v. Webb*, 451 U.S. 493, 496-97 (1981). As this Court has clarified:

> Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below. . . . A litigant seeking review in this Court of a claim properly raised in the lower courts thus generally possesses the ability to frame the question to be decided in any way he chooses, without being limited to the manner in which the question was framed below.

Yee v. City of Escondido, 503 U.S. 519, 534-35 (1992) (citations omitted). Petitioners raised, argued and preserved their due process rights and claims.

In opposing respondents' motion to dismiss due to alleged spoliation, petitioners requested that an evidentiary hearing be conducted if the court found disputed facts and questioned witness credibility. (Record on Appeal of the February 9, 2000 decision and order ("R.") 3787–88.) Ironically, counsel for Proskauer followed suit and also suggested that the court hear testimony. (R. 3793.) The court explicitly refused to conduct a hearing. In its February 9, 2000 decision and order dismissing virtually all of petitioners' claims, the New York supreme court held that "'plaintiffs were not entitled to a fact-finding hearing to determine the nature of the documents they wrongfully discarded.'" (App. 16a.) It is beyond question that the claim was properly presented, and that the supreme court understood the request for a hearing and the implication of its ruling.

Petitioners also sought a hearing and/or asserted that the dismissal of their claims was a denial of due process under the United States Constitution: (1) in the appellate brief to the First Department appealing the February 9, 2000 decision and order

of the New York supreme court (*see* Appellants' Brief, dated March 20, 2000, at 1); (2) in the appellate brief to the First Department appealing the supreme court's subsequent order dated January 29, 2001, which dismissed petitioners' conflict of interest claim against Proskauer (*see* Brief for Plaintiffs-Appellants, dated March 19, 2001, at 4, 6, 32-34, 39, and 40); (3) in petitioners' reply brief submitted to the First Department on the appeal of the January 29, 2001 order (*see* Reply Brief for Plaintiffs-Appellants, dated April 27, 2001, at 23-25); (4) in petitioners' motion for leave to appeal submitted to the New York Court of Appeals on May 11, 2001 (*see* Motion of Plaintiffs-Appellants for Leave to Appeal to the Court of Appeals, dated May 11, 2001, at 14, 24, 25 n.16, and 27-28); and (5) in petitioners' motion for leave to appeal submitted to the New York Court of Appeals on November 9, 2001. (*See* Motion of Plaintiffs-Appellants for Leave to Appeal to the Court of Appeals, dated November 9, 2001, at 18, 29-31.)

Thus, the centerpiece of respondents' opposition — that petitioners failed to raise their due process claims — is contradicted by the record.

II. Due Process Requires That A Hearing Be Conducted To Determine Whether The Discarded Tapes Were Relevant

In their briefs, respondents repeatedly state that petitioners willfully destroyed relevant evidence that they were obligated to produce, (Proskauer Br. at 3; NSI Br. at 1-2), thereby mischaracterizing the principal issue in this case. That tapes were intentionally discarded has never been the issue. Indeed, petitioner Melvyn Kaufman wrote and told Proskauer that he discarded tapes immediately after he did so. (R. 56-67.) However, it has consistently been petitioners' contention that those discarded tapes contained conversations that were wholly *irrelevant* and unrelated to the instant action. There is no evidence in the record that, once litigation was contemplated,

any tape containing a relevant conversation was discarded. No hearing was held on this issue. The disputed fact, which is a threshold issue, is whether the discarded information was *relevant*. Petitioners seek an evidentiary hearing on that issue. The legal question presented to this Court is whether the New York courts, by denying petitioners a hearing on whether *relevant* evidence was discarded, deprived petitioners of rudimentary due process.

Respondents' distortion of this fundamental issue is elucidated by a comparison of statements in respondents' briefs. Respondents refer to petitioners' "admitted destruction of relevant evidence" (Proskauer Br. at 5; *see also* NSI Brief at 2), and later in their briefs discuss the adverse inference relied on by the New York courts. (Proskauer Br. at 14; NSI Br. at 6.) Had petitioners "admitted" that they destroyed "relevant evidence," there would have been no need for the New York courts to extend the adverse inference impermissibly to infer that the discarded tapes were relevant. (App. at 8a and 16a.) The New York courts improperly resorted to the adverse inference because, in fact, there was not a scintilla of evidence that the discarded tapes were relevant.

The record makes plain that petitioners adamantly and consistently denied that the tapes were relevant. Due process requires an evidentiary hearing to determine whether those tapes were, or were not, relevant.

III. There Is A Split Of Authority Regarding When Due Process Requires An Evidentiary Hearing

Contending that the case law petitioners cite lacks discussion of any constitutional issue, respondents argue that there is no conflict of authority regarding when due process requires an evidentiary hearing to resolve disputed facts raised on motions to dismiss due to alleged spoliation. (Proskauer Br. at 13-14; NSI Br. at 5-6.) Respondents misstate the law. Disputed

material facts must be resolved by the fact-finder following a hearing or trial to comport with due process. As this Court has held, "there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." *Societe Internationale Pour Participations Industrielle et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 209 (1958). Disputed facts as to whether spoliation occurred should be no exception to this rule. Yet, in determining disputed facts on spoliation motions, some courts have conducted hearings, as due process requires, and, in similar circumstances, other courts have declined to conduct hearings, in violation of due process. *Compare Austral Pacific Fertilizers, Ltd. v. Cooper Industries, Inc.*, Nos. 95-4255/95-4287, 1997 U.S. App. LEXIS 5383, at *6-12 (CA6 March 18, 1997) (unpublished), *with Torres v. Matsushita Electric Corp.*, 762 So. 2d 1014, 1015-16 (Fla. Dist. Ct. App. 2000); *see also* Petition for a Writ of Certiorari, II.A.

As illustrated by case law, a genuine conflict of authority exists. *See* Petition for a Writ of Certiorari, II.A. One circuit court of appeals has upheld an order dismissing plaintiff's claims due to spoliation of evidence where no evidentiary hearing was conducted to resolve disputed issues of fact, *Silvestri v. General Motors Corp.*, 271 F.3d 583, 588-89, 595 (CA4 2001), while another circuit court of appeals afforded a hearing to determine disputed facts prior to dismissal. *Nation-Wide Check Corp. v. Forest Hills Distributors, Inc.*, 692 F.2d 214, 216-20 (CA1 1982) (Breyer, J.).

This same inconsistent application of due process rights with respect to requiring a fact-finding hearing is found at the state level, as well. Numerous state courts have dismissed causes of action, even where disputed issues of fact were raised, without conducting an evidentiary hearing. *See Torres*, 762 So. 2d at 1015-16, 1018; *Sonmez v. World on Columbus, Inc.*, 261 A.D.2d 199, 199 (1st Dep't 1999); *see also* cases cited in Petition for

Writ of Certiorari, at 17-18. At the same time, other state courts, finding similar facts, have conducted hearings or submitted the disputed facts to the jury. *See Smedley v. Raymond Corp.*, No. C035823, 2002 Cal. App. Unpub. LEXIS 462, *3-4 (Cal. Ct. App. April 29, 2002); *Gordon v. State Farm Insurance Co.*, 700 So. 2d 1117, 1119-20 (La. Ct. App. 1997); *R.S. Creative, Inc. v. Creative Cotton, Ltd.*, 89 Cal. Rptr. 2d 353, 360 (Cal. Ct. App. 1999); *Graves v. Daley*, 526 N.E.2d 679, 680 (Ill. App. Ct. 1988); *see also* cases cited in the Petition for a Writ of Certiorari, at 18.

The courts' uneven treatment of a litigant's due process rights on a motion to dismiss for alleged spoliation of evidence renders this issue ripe for review by this Court.

CONCLUSION

For these additional reasons, and because respondents have failed to rebut or adequately address the arguments raised, petitioners submit that this Court should grant a writ of certiorari to the Appellate Division of the Supreme Court of the State of New York for the First Department to address the important question concerning what constitutes due process when disputed facts regarding relevance are raised on a motion to dismiss due to alleged spoliation of evidence.

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